# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1922.

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## No. 394.

THE UNITED STATES OF AMERICA AND THE CITY OF NEW YORK, PLAINTIFFS IN ERROR,

vs.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF THE TRUSTS CREATED BY THE LAST WILL AND TESTAMENT OF WILLIAM C. LANGLEY, DECEASED.

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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## INDEX.


| | Original. | Print. |
|---|---|---|
| Writ of error of the United States of America | a | 1 |
| Writ of error of the city of New York | d | 2 |
| Record from the District Court of the United States for the Eastern District of New York | 1 | 3 |
| Writ of error of the United States of America | 1 | 3 |
| Writ of error of the city of New York | 3 | 4 |
| Summons | 5 | 5 |
| Bill of complaint | 7 | 5 |
| Exhibit A. Last will of Wm. C. Langley | 18 | 11 |
| Exhibit B. War Department award No. 530 | 22 | 14 |
| Order making city of New York a defendant | 25 | 15 |
| Supplementary summons | 26 | 15 |
| Amended complaint | 28 | 16 |
| Exhibit A. Last will of Wm. C. Langley | 40 | 22 |
| Exhibit B. War Department award No. 830 | 44 | 24 |
| Exhibit C. Report of War Department Board of Appraisers, Apr. 22, 1919 | 46 | 25 |
| Answer of the United States | 51 | 28 |
| Answer of the city of New York | 54 | 29 |
| Judgment | 57 | 30 |
| Opinion, Garvin, J. | 59 | 31 |

| | Original. | Print. |
|---|---|---|
| Record from the District Court of the United States for the Eastern District of New York—Continued. | | |
| Order striking separate and distinct defense of United States of America | 66 | 34 |
| Bill of exceptions | 68 | 35 |
| Offers in evidence | 69 | 35 |
| Testimony of George F. Benedict | 70 | 36 |
| Charles E. Trout | 74 | 38 |
| Lawrence A. Bowe | 83 | 44 |
| William H. Seibert | 84 | 45 |
| John F. Murphy | 87 | 47 |
| Thomas P. Graham | 91 | 49 |
| David Porter | 154 | 91 |
| Charles J. Farley | 210 | 130 |
| Charles E. Trout (recalled) | 282 | 179 |
| Lewis H. Pounds | 286 | 182 |
| William G. Morrisey | 321 | 204 |
| Thomas Hovenden | 355 | 226 |
| Henry Lincoln Green | 400 | 255 |
| Motion of United States to introduce additional testimony and order denying | 421 | 268 |
| Motion to amend answer of city of New York and order denying | 423 | 269 |
| Findings of fact and conclusions of law | 426 | 270 |
| Proposed findings of fact and conclusions of law of the United States of America | 447 | 280 |
| Proposed findings of fact and conclusions of law of the city of New York | 450 | 282 |
| Proposed supplementary findings of fact and conclusions of law of the city of New York | 455 | 284 |
| Request of the United States of America for findings of fact and conclusions of law proposed by city of New York | 460 | 286 |
| Exceptions to findings of fact and conclusions of law by the United States of America | 462 | 287 |
| Exceptions to findings of fact and conclusions of law by the city of New York | 468 | 290 |
| Stipulation waiving jury trial | 471 | 291 |
| Order settling bill of exceptions | 472 | 291 |
| Order of substitution | 473 | 292 |
| Petition for writ of error by the United States of America | 475 | 292 |
| Assignment of errors by United States of America | 477 | 298 |
| Petition for writ of error by the city of New York | 493 | 300 |
| Assignment of errors by the city of New York | 495 | 301 |
| Citations | 505 | 306 |
| Stipulation waiving printing of exhibits | 507 | 307 |
| Exhibit B. Stipulation as to exhibits | 508 | 308 |
| Exhibit W. Stipulation | 519 | 309 |
| Exhibit 1. Stipulation | 511 | 309 |
| Stipulation as to transcript | 513 | 310 |
| Clerk's certificate | 513 | 310 |
| Proceedings in the Circuit Court of Appeals | 514 | 310 |
| Notice of motion to dismiss writ of error and appeal | 514 | 310 |

| | Original. | Print. |
|---|---|---|
| Affidavit of George F. Benedict | 516 | 311 |
| Findings of fact and conclusions of law, Garvin, J | 521 | 314 |
| Clerk's certificate district court | 537 | 325 |
| Judgment | 538 | 325 |
| Order overruling motion to dismiss writ of error and granting motion to dismiss appeal | 541 | 326 |
| Opinion, Hough, C. J | 542 | 327 |
| Remittitur | 553 | 334 |
| Judgment | 556 | 335 |
| Petition of the United States of America for writ of error and order allowing | 558 | 336 |
| Assignments of error of United States of America | 561 | 337 |
| Petition of the city of New York for writ of error and order allowing | 563 | 339 |
| Assignments of error of the city of New York | 565 | 340 |
| Clerk's certificate | 568 | 341 |
| Citation of United States of America | 569 | 342 |
| Citation of city of New York | 570 | 343 |

a THE UNITED STATES OF AMERICA, *ss:*

*The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, greeting:*

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between the United States of America, plaintiff in error, and George F. Benedict, as sole surviving trustee of the trusts created by the last will and testament of William C. Langley, deceased, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness: the Honorable William H. Taft, Chief Justice of
b the United States, the 26th day of April, in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the United States the one hundred and forty-sixth year.

[SEAL.] WM. PARKIN,
*Clerk, United States Circuit Court of Appeals for the Second Circuit.*

The foregoing writ is hereby allowed.
April 26th, 1922.

MANTON,
*United States Circuit Judge.*

c United States Circuit Court of Appeals for the Second Circuit. United States of America, plaintiff in error (defendant below), against George F. Benedict, as sole surviving trustee of the trusts created by the last will and testament of William C. Langley, deceased, defendant in error (plaintiff below). Writ of error. Ralph C. Greene, United States attorney, Eastern District of New York. United States Court of Appeals, Second Circuit. Filed Apr. 27, 1922. William Parkin, clerk.

Copy received Apr. 27, 1922, Seibert & Riggs, attorneys for defendant in error.

A copy of the within paper has been this day received at the Office of the Corporation Counsel, Apr. 27, 1922, John P. O'Brien, Corporation Counsel.

d. UNITED STATES OF AMERICA, *ss:*

*The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between United States of America and The City of New York, plaintiffs in error and George F. Benedict, as sole surviving trustee of the trusts created by the last will and testament of William C. Langley, deceased, defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error, The City of New York, as by it complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, within thirty days from the date hereof in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

e Witness, the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, this 27th day of April, in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the United States the one hundred and forty-sixth.

[SEAL.] WM. PARKIN,
*Clerk of U. S. Circuit Court of Appeals.*

The foregoing writ is hereby allowed.

MANTON,
*Circuit Judge.*

f Copy received April 28, 1922; Seibert & Riggs, attorneys for plaintiff.

United States Circuit Court of Appeals for the Second Circuit. United States of America and The City of New York, plaintiff in error (defendants below), *vs.* George F. Benedict, a sole surviving trustee of the trust created by the last will and testament of William C. Langley, deceased, defendant in error (plaintiff below). (Original.) Writ of error. John P. O'Brien, corporation counsel, Munici-

pal Building, Borough of Manhattan, New York City. Due and timely service of a writ of error of which the within is a copy is hereby admitted. New York, April 28, 1922, Ralph C. Greene, United States attorney.

United States Circuit Court of Appeals, Second Circuit. Filed Apr. 28, 1922. William Parkin, clerk.
Served by P. J. Ryan, April 28, 1922.

1 *Writ of Error by the United States of America.*

*The President of the United States of America to Honorable Edwin L. Garvin, Judge of the District Court of the United States for the Eastern District of New York, greeting:*

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said District Court before you between George F. Benedict, as sole surviving trustee of the trusts created by the last will and testament of William C. Langley, deceased, as plaintiff, and United States of America and City of New York, as defendants, a manifest error hath happened to the great damage of the said United States of America, defendant, as by its complaint appears we being willing that such error, if any hath been, should be duly corrected and full speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the United Circuit Court of Appeals for the Second Circuit, together with this writ so that you have the same at the City of New York in said Circuit on the 30th day of April, 1921, into said Circuit Court of Appeals, to be then and there held, that the record and proceeding aforesaid be inspected, the said
2 Circuit Court of Appeals may cause further to be done therein to orrect that error, what of right according to the laws and customs of the United States should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 1st day of April, in the year of our Lord, 1921, and of the Independence of the United States the one hundred and forty-fifth.

Percy G. B. Gilkes,
*Clerk.*

The above writ is hereby allowed.

Edwin L. Garvin,
*U. S. D. J.*

3 *Writ of error by the city of New York.*

UNITED STATES OF AMERICA, *ss.:*

*The President of the United States of America to the Judges of the District Court of the United States for the Eastern District of New York, greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between George F. Benedict, as sole surviving trustee of the trusts created by the last will and testament of William C. Langley, deceased, defendant in error (plaintiff below) and United States of America and the City of New York, plaintiffs in error (defendants below), a manifest error hath happened, to the great damage of the said plaintiff in error, The City of New York, as is said and appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, to be held at the United States Court House in the Borough of Manhattan, in the City and State of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 30th day of April, 1921, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be done
4 therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 1st day of April, in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the United States the one hundred and forty-fifth year.

PERCY G. B. GILKES,
*Clerk of the District Court of the United States of America for the Eastern District of New York, in the Second Circuit.*

The foregoing writ is hereby allowed.

EDWIN L. GARVIN,
*United States District Judge.*

5 *Summons.*

United States District Court, for the Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA, DEFENDANT. } L.-932.

*To the above-named defendant:*

You are hereby summoned to answer the complaint in this action, and file your answer and serve a copy thereof on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Thomas I. Chatfield and Edwin L. Garvin,
judges of the District Court of the United States for the
6 Eastern District of New York, at the borough of Brooklyn,
this 17th day of September, in the year one thousand nine hundred and nineteen.

(Signed) PERCY G. B. GILKES,
*Clerk.*

By J. G. COCHRAN,
*Deputy Clerk.*

GANNON, SEIBERT & RIGGS,
*Plaintiff's Attorneys, Office and P. O. Address, 2 Rector Street, Borough of Manhattan, New York City, New York.*

7 *Complaint.*

United States District Court, for the Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA, AND THE CITY OF NEW York, defendants.

The plaintiff, complaining of the defendant through his attorneys, Gannon, Seibert & Riggs, alleges:

I. That the United States of America is a corporation created by the Constitution of the United States with its principal offices in the city of Washington, District of Columbia, and plaintiff alleges upon information and belief that within the meaning of the New York Code of Civil Procedure said United States of America is a foreign corporation.

II. That Wiliam C. Langley, late of the county of Kings, died on or about the 1st day of December, 1890, seized in fee simple absolute of two certain pieces or parcels of land hereinafter described, located in the borough of Brooklyn, county of Kings, city and
8 State of New York, and within the territorial jurisdiction of the United States Court for the Eastern District of New York; that said William C. Langley left a last will and testament, which said last will and testament was duly admitted to probate by the Surrogates Court of the county of Kings, State of New York, wherein and whereby said William C. Langley devised and bequeathed said premises hereinafter described, together with other property to certain trustees therein named, to wit: William H. Langley and Charles C. Goodrich, in trust for the uses and purposes and with the powers therein set forth; that a copy of said last will and testament is hereto annexed and made a part hereof, marked "Exhibit A."

III. That said William H. Langley and Charles C. Goodrich accepted such trusts and duly qualified as such trustees under said last will and testament, and respectively entered upon the duties thereof; that thereafter said Charles C. Goodrich resigned and William F. Dunning was duly appointed as substituted trustee in his place under said will, by order of the Surrogate's Court, county of Kings, State of New York, and said William F. Dunning accepted said trusts and duly qualified as such trustee and entered upon the duties thereof; that thereafter said William F. Dunning died April 1st, 1907, and George F. Benedict was duly appointed as substituted trustee in his place under said will, by order of the Supreme Court, county of Kings, State of New York, and said George F. Benedict accepted said trusts and duly qualified as such trustee and entered upon the duties thereof; that thereafter and on or about June 22nd, 1919, said William H. Langley died and the said George F.
9 Benedict is now and has been since said date the sole surviving trustee under the said last will and testament.

IV. That for many years prior to April 6th, 1918, said William H. Langley and George F. Benedict, as trustees as aforesaid, were the owners in fee and were duly seized and possessed of the following-described property, situate, lying, and being in the Borough of Brooklyn, city of New York, and State of New York, and situated within the jurisdiction of the United States District Court for the Eastern District of New York; so devised in trust by William C. Langley, as hereinbefore set forth:

"All those certain lots, pieces, or parcels of land, situate, lying, and being in the Borough of Brooklyn, County of Kings, State and city of New York, more particularly described as follows:

"Parcel No. 1.

"Beginning at the point of intersection of the westerly line of First Avenue and the centre line of Fifty-eighth Street; running

thence westerly along the centre line of 58th Street, and its prolongation eighteen hundred and twelve feet (1,812) and seven (7) inches, more or less to the pierhead line established by chapter 491 of the Laws of the State of New York of 1884 and approved by the Secretary of War on March 4th, 1890; thence southerly along said pierhead line two hundred and sixty (260) feet and four (4) inches to a point opposite the prolongation of the centre line of 59th Street; thence easterly along the centre line of 59th Street and its prolongation eighteen hundred and nineteen (1,819) feet and seven (7) inches, more or less, to the westerly line of First Avenue; and thence northerly along the westerly line of First Avenue two hundred and sixty (260) feet and four (4) inches, more or less, to the point or place of beginning, containing approximately four hundred and seventy-two thousand seven hundred and eighty and one-tenth (472,780.1) square feet.

"Parcel No. 2.

"All that certain lot, piece, or parcel of land beginning at the point of intersection of the westerly line of First Avenue and the southerly line of Sixty-third Street and its prolongation; running thence northerly along the westerly line of First Avenue six hundred and sixty-eight (668) feet and one (1) inch to a point one hundred and eighteen (118) feet and one (1) inch northerly from the centre line of Sixty-first Street; running thence westerly at right angles to the westerly line of First Avenue eighteen hundred and thirty-four (1,834) feet and five and one-half (5½) inches, more or less, to the pierhead line above described; thence southerly along said pierhead line approximately six hundred and sixty-eight (668) feet to a point on said pierhead line formed by the intersection therewith of the southerly line of Sixty-third Street, prolonged; thence easterly along the southerly line of Sixty-third Street, prolonged eighteen hundred and eighty-two (1,882) feet three and three-eighths (3⅜) inches, more or less, to the point of beginning, containing approximately one million two hundred and forty-one thousand five hundred forty-one and nine-tenths (1,241,541.9) square feet."

V. That on or about April 6th, 1918, all the real property hereinbefore described, except those portions thereof lying in the beds of proposed Sixty-third Street and Fifty-eighth Street, between First Avenue and the pierhead line, as laid out on the land map of the city of New York, such streets not yet being opened, and all right, title, and interest of the said trustees therein and thereto was requisitioned, commandeered, and taken by the United States of America, acting through the President as its duly authorized agent, for an army supply base and expeditionary depot, to provide facilities for the storage of supplies connected with the common defense; that the United States of America in making said requisition, known as Army Requisition No. 2 R/J, acted under authority of section 10

of the food and fuel act of August 10th, 1917 (40 Statutes 379), authorizing the President of the United States from time to time to requisition feeds, foods, fuels, and other supplies necessary to the support of the Army or any other public use connected with the common defense, and to requisition or otherwise provide storage facilities for such supplies, and to ascertain and pay a just compensation therefor; and on said 6th day of April, 1918, the United States of America took possession of said premises hereinbefore described, excepting such portions thereof as lay in the beds of Sixty-third and Fifty-eighth Streets, as aforesaid, and excluded the said trustees from all right, title, and interest therein and from possession
12 thereof, and the United States of America appropriated the said premises to its own use and has ever since retained possession of the same.

VI. That thereafter and on or about May 31st, 1918, such portions of the hereinbefore-described property as lay within the beds of the proposed Sixty-third and Fifty-eighth Streets, between First Avenue to the pierhead line, as laid out on the land map of the city of New York, such streets, not yet being opened, and all right, title, and interest of the said trustees therein and thereto were similarly requisitioned, commandeered, and taken by the United States of America, acting through the President thereof as its duly authorized agent, for similar purposes, by supplementary requisition No. 202 B/C, under similar authority, and on May 31st, 1918, the United States of America took possession of said premises and excluded the said trustees from all right, title, and interest therein and from possession thereof, and the United States of America appropriated the same to its own use and has ever since retained possession of the same.

VII. That the President of the United States, acting pursuant to the provisions of section 10 of the act hereinbefore referred to, in and by the provisions of General Orders, No. 30, duly promulgated by the War Department at Washington, District of Columbia, dated April 1st, 1918, duly constituted and composed in the said War Department a Board of Appraisers, composed as therein set forth and charged with duties as therein described, among which duties were to determine by proper methods just compensation for all property requisitioned and commandeered or otherwise sum-
13 marily taken over according to law for the direct and special use of the Army; that thereafter, and from time to time the said trustee attended the Board of Appraisers, constituted and composed by General Orders, No. 30, hereinbefore referred to, and presented a claim for just compensation for the property requisitioned and commandeered as hereinbefore described, and such proceedings were had by such board that on or about May 2nd, 1919, the said Board of Appraisers made an award, being Award No. 830, for requisitions Nos. 8 B/C and 202 B/C, as hereinbefore set forth, finding that the said property, hereinbefore described, in two parcels containing, respectively, 472,780.1 square feet and 1,241,541.9 square feet,

was taken for public use by the United States of America on April 6th, 1918, and May 31st, 1918, respectively, and awarding to the former owners thereof as just compensation for the taking of said property, including the value thereof and damages arising out of the taking thereof, and all charges accrued against or on account of said property prior to the taking thereof, the sum of one million, seven hundred and ninety-six thousand, five hundred and twenty-two and 20/100 ($1,796,522.20) dollars, with interest thereon at the rate of five (5) per cent per annum from May 1st, 1918, to the date of voucher for final payment, a copy of said Award No. 830 being hereto atttached and made part hereof marked "Exhibit B."

VIII. That said Board of Appraisers in making said award allowed compensation to the said trustees for the premises requisitioned, commandeered and taken at the rate of one and 10/100 ($1.10) dollars per square foot of such premises.

14 IX. That the Board of Appraisers in making said award unjustly and wrongfully refused to allow compensation to the said trustees for certain strips or parcels of land situated within the beds of certain streets laid out on the land map of the city of New York, though not yet opened, upon the ground that said beds of streets were not the property of the said trustees, but had been previously conveyed and delivered by the said trustee or their predecessors to the city of New York; that the amount of land for which said Board of Appraisers so refused to allow compensation was estimated at forty-one thousand (41,000) square feet on the award hereinbefore set forth, but that the amount of said land for which the United States of America unjustly and wrongfully refused to allow compensation was in fact approximately eighty thousand (80,000) square feet.

X. That said sum so awarded by the said Board of Appraisers was not the real or reasonable or market value of said real property, but was far below the real or reasonable or market value of the same; that the said sum was and is not just or proper compensation for the same; that the said board allowed interest on said sum at the rate of only five (5) per cent per annum instead of six (6) per cent per annum; and that said award was unjust and insufficient compensation for said premises.

XI. That thereafter the plaintiff duly notified the United States of America that the compensation so determined was not satisfactory to the plaintiff, the plaintiff being the person entitled to receive the same and rejected the said award, and thereafter plaintiff,

15 on or about the 11th day of July, 1918, was paid seventy-five (75) per cent of the amount so determined by the said Board of Appraisers, to wit: the sum of one million, three hundred and forty-seven thousand, three hundred and ninety-six and 65/100 ($1,347,396.65) dollars, with interest thereon at five (5) per cent. from May 1st, 1918, to said date of closing, July 11th, 1919, being the

date of voucher for final payment, and the plaintiff conveyed the said property hereinbefore described in fee simple to the United States of America, free and clear of all liens and encumbrances in consideration of said amount and such further sum as might be awarded by the United States court as just compensation therefor.

XII. That prior to the said conveyance being accepted by the United States of America, the title to the property therein described and hereinbefore set forth had been duly examined by the legal authorities of the United States who duly reported that the said property was duly vested in the said trustees, as hereinbefore alleged, free and clear from all encumbrances except as to the premises alleged to have been conveyed by the plaintiff's predecessors to the city of New York, by deed dated April 25th, 1899, and for which no compensation was awarded by the said board.

XIII. At the time of the taking and appropriation of said property by the United States of America, to wit: April 6th, 1918, said real property hereinbefore described was of the real and reasonable and fair market value of at least three million, four hundred and twenty-eight thousand, six hundred and forty-four ($3,428,644) dollars, and that nothing less than said amount is just compensation for said property.

16 XIV. That no part of the said sum of three million four hundred and twenty-eight thousand six hundred and forty-four dollars ($3,428,644) has been paid by the defendant to the plaintiff except the sum of one million three hundred and forty-seven thousand three hundred and ninety-six and 65/100 dollars ($1,347,396.65), being an amount equal to seventy-five per cent (75%) of the said award of the said Board of Appraisers.

XV. That the amount to be added to the said seventy-five per cent (75%) of said award to make up an amount which will be just compensation to the plaintiff for said property hereinbefore described, so commandeered, taken and appropriated by the United States of America, is two million eight-one thousand two hundred and forty-seven and 35/100 dollars ($2,081,247.35), with interest on said amount at six per cent (6%) per annum, said amount of six per cent (6%) being the legal rate of interest in the State of New York and the customary rate in said State, from April 6th, 1918, the date of such taking and appropriation by the United States of America, except for such portions of the property as lay within the limits of proposed Sixty-third and Fifty-eighth Streets from First Avenue to the pierhead line, and as to such portions to date of taking and appropriation by the United States of America, May 31st, 1918, and plaintiff is entitled to interest at the rate of six per cent (6%) per annum on the value of said property within such streets from such date of May 31st, 1918; and the plaintiff is also entitled to the payment of an additional amount of interest at one per cent (1%) per annum on said amount of seventy-five per cent (75%) of

17 said award, to wit: One million three hundred and forty-

seven thousand three hundred and ninety-six and 65/100 dollars, ($1,347,396.65) from April 6th, 1918, to July 11th, 1919.

XVI. That there is now due and owing from the United States of America to the plaintiff the sum of two million eighty-one thousand two hundred and forty-seven and 35/100 dollars ($2,081,247.35), with interest thereon as hereinbefore set forth; and also a sum for interest at one per cent (1%) on said sum of one million three hundred and forty-seven thousand three hundred and ninety-six and 65/100 dollars ($1,347,396.65) from April 6th, 1918, to July 11th, 1919.

WHEREFORE the plaintiff demands judgment against the United States of America for the sum of two million eighty-one thousand two hundred and forty-seven and 35/100 dollars ($2,081,247.35), with interest thereon at the rate of six per cent (6%) per annum from April 6th, 1918, as hereinbefore set forth, and for a sum of interest at one per cent (1%) on one million three hundred and forty-seven thousand three hundred and ninety-six and 65/100 dollars ($1,347,396.65) from April 6th, 1918, to July 11th, 1919, together with the costs and disbursements of this action.

GANNON, SEIBERT & RIGGS,
*Attorneys for Plintiff, Office and P. O. Address,*
*2 Rector Street, Borough of Manhattan, City of New York.*
ROYAL E. T. RIGGS, *Of Counsel.*

18 STATE OF NEW YORK,
*County of New York, ss.:*

GEORGE F. BENEDICT, being duly sworn, deposes and says:

That he is the plaintiff herein; that he has read the foregoing complaint and knows the contents thereof, and that the same is true to his own knowledge and except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

GEORGE F. BENEDICT.

Sworn to before me this 17th day of September, 1919.

[SEAL.] WILLIAM F. O'CONNOR,
*Notary Public, New York County No. 75; New York County Register No. 1155; Kings County Clerk's No. 17; Kings County Register No. 1027.*

My commission expires March 31, 1921.

EXHIBIT A.

In the Name of God, Amen.

I, William C. Langley, of the city of New York, merchant, do make, publish, and declare this my last will and testament.

First. I give and bequeath to my son, William H. Langley, one million dollars.

19 Secondly, I give and bequeath to Charles G. Goodrich, who now is and for many years has been my partner in business, one hundred thousand dollars.

Thirdly. I give and bequeath to Alice M. Bowker (who for many years has resided in my family) an annuity of three thousand dollars, to be paid to her by my executors and trustees in quarter-yearly payment of seven hundred and fifty dollars each, the first payment to be made three months after my death, and thereafter payments shall be made quarter-yearly so long as she shall live.

I direct my executors within six months after the probate of this will to execute an instrument in writing whereby they shall designate three full blocks of my lands in the town of New Utrecht, Kings County, New York, lying between Sixty-third and Sixty-fifth Streets and Third and Fourth Avenues as laid down in the plot of New Utrecht, being continuations of the same streets and avenues as laid down on the map of the city of Brooklyn, and I charge the said annuity as a lien on the three blocks so designated. My executors and trustees may, however, at any time in their discretion sell and dispose of the said three blocks or any part thereof, and in case of such sale or other disposition the lien above created shall cease and the portions sold or disposed of shall, after such sale or disposition, be free therefrom. They shall, however, substitute in lieu of the lands so released other lands or securities of equal value.

I authorize Alice W. Bowker, with the concurrence and
20 approbation of my executors, to select from my personal effects such articles as she may require for her personal use. And I give and bequeath to her the articles so selected, such selection to be made by her within three months next after the probate of this my will.

I desire my executors to keep my burial plot in the cemetery at Medfield, Massachusetts, in good order, and I authorize them from time to time to expend for that purpose and for improving and embellishing the same such sums as in their judgment may be proper. In case my son shall wish that his remains or those of his wife and children shall be buried in said plot, I authorize such burial. I also authorize the burial of Alice M. Bowker in said plot if such should be her desire.

Fourthly. If Henry L. Kemp, now in my service, shall be so employed at the time of my death, I give and bequeath unto him the sum of five thousand dollars.

Fifthly. I give, devise, and bequeath all the rest and residue of my property of every kind and character, wheresoever situate and that may remain after the payment of my debts and the legacies hereinbefore given to my executors and trustees hereinafter named, to be by them held in trust, that is to say, in trust during the life of my son, William H. Langley, as to my real estate to demise and let the same from time to time, and as to personal estate, to invest, manage,

and control the same in their discretion, and to collect and receive the income therefrom, and after defraying all charges thereon to pay the net income when received to my said son during his life. And

21 at the death of my son to assign, transfer, and pay whatever may then be held under this trust to his children who may survive him, so that each of his children shall receive an equal share thereof.

I hereby authorize and empower my said executors and trustees and their successor and successors, to sell at their discretion as to the time and terms and at public or private sale, all and every part of my real estate, and to execute and deliver ances for the same to the respective purchasers thereof.

I nominate, constitute and appoint my son, William H. Langley, and my friend, Charles C. Goodrich, to be executors of and trustees under this my last will and testament, and I desire and hereby request that they shall not be required, by reason of nonresidence in this State or for any other cause, to give any bond or security either as executors or trustees.

My will is that my said executors and trustees shall not charge or receive any commissions or compensation for their services as executors or trustees. I have had this in my mind in making the bequests herein contained in their favor.

Lastly. I hereby revoke all other wills by me made.

In witness whereof I have hereunto subscribed my name at the city of New York on the eighth day of February, one thousand eight hundred and ninety, in the presence of B. F. Dunning, F. P. Fowler, and Wm. F. Dunning, attesting and subscribing witnesses, at the same time declaring this to be my last will and testament.

WM. C. LANGLEY. [L. S.]

22 Subscribed by the testator in the presence of us and declared by him at the time of making each subscription to be his last will and testament, whereupon we at his request, in his presence and in the presence of each other, have subscribed our names as witnesses, attesting the execution thereof, this certificate having been first read aloud to the testator in his and our presence and hearing.

On the third page in the fourth line the words "wife" "and" were interlined before execution.

B. F. DUNNING,
*37 West 38th Street.*
THOMAS P. FOWLER,
*39 East 68th Street.*
W. F. DUNNING,
*215 West 44th Street.*

EXHIBIT B.

WAR DEPARTMENT OF APPRAISERS,
MUNITIONS BLDG., 19TH & B STS.,
*Washington, D. C., May 2, 1919.*

Files Nos. 6 B/C
202 B/C

Award No. 530.

Upon consideration of the facts in this claim, the Board of Appraisers finds that the estate of William C. Langley, deceased, were the owners of certain real estate located at Brooklyn, Kings County, New York, described generally as—

All that plot lying between the center line of 58th St., on
23 the north; the center line of 39th St. on the south; the westerly line of First Avenue on the east and New York Bay on the west; containing 472,780.1 sq. ft. more or less; and all that plot lying between a point 88 ft. 1 in. north of the northerly line of 61st St. on the north; the southerly line of 63rd St. on the south; the westerly side of First Avenue on the east and New York Bay on the west; containing 1,241,641.9 sq. ft. more or less; more particularly described in United States Army Requisition 8 B/C, issued April 3, 1918, and 202 B/C, issued May 24, 1918; excepting thereout approximately 41,580 sq. ft. conveyed to the City of New York by deed dated April 25, 1899;

and that the said property was taken for the public use by the United States on April 8th, 1918, and May 31st, 1918.

Whereupon this board awards to the former owners as just compensation for the taking of said property, including the value thereof, and damages arising out of the taking thereof, and all charges accrued against or on account of said property prior to the taking thereof, the sum of one million seven hundred ninety-six thousand five hundred twenty-two dollars and twenty cents ($1,796,522.20), with interest thereon at the rate of five per cent (5%) per annum from May 1st, 1918, to the date of voucher for final payment.

Payment of said award is not to be made until said property has been conveyed to the United States of America, in fee simple, free and
24 clear of all liens and incumbrances, and title thereto has been approved by the proper legal authorities; and that said deed shall contain an accurate and detailed description of property covered by this award.

WAR DEPARTMENT BOARD OF APPRAISERS,
By J. L. KNOWLTON,
J. L. KNOWLTON, *Col., General Staff,*
*Acting Chairman.*

A true copy.
Attest:

(Sgd.) EDWARD H. WALTON,
EDWARD H. WALTON,
Recorder.

25 *Order making the city of New York a defendant.*

At a District Court of the United States, held in and for the Eastern District of New York, on the 31st day of October, 1919.

Present: Thomas I. Chatfield, Judge.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA, DEFENDANT.

Upon reading and filing the stipulation of the parties hereto, dated October 29th, 1919, and upon motion of Hon. LeRoy W. Ross, United States district attorney for the defendant herein, it is

Ordered that the city of New York be brought in as a party defendant in the above-entitled action, and that the clerk of the court issue a supplementary summons directed to the city of New York, that the plaintiff is permitted to make and file within ten days a supplementary complaint including the city of New York as a party defendant therein, without prejudice to proceedings heretofore had.

THOMAS I. CHATFIELD,
*U. S. D. J.*

26 *Supplementary summons.*

United States District Court for the Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA AND THE CITY OF NEW York, defendants.
L-932.

*To the Above-Named Defendants The City of New York:*

You are hereby summoned to answer the complaint in this action, and file your answer and serve a copy thereof on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear,
27 or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Thomas I. Chatfield and Edwin L. Garvin, Judges of the District Court of the United States for the Eastern District of New York, at the Borough of Brooklyn, this 7th day of November, in the year one thousand nine hundred and nineteen.

[L. S.] (Sgd.) PERCY G. B. GILKES,
*Clerk.*

By J. G. COCHRAN,
*Deputy Clerk.*

GANNON, SEIBERT & RIGGS,
*Plaintiff's Attorneys, Office and Post Office Address 2 Rector Street, Borough of Manhattan, New York City, New York.*

28 *Amended complaint.*

United States District Court for the Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA AND THE CITY OF NEW YORK, defendants.

The plaintiff complaining of the defendants, through his attorneys, Gannon, Seibert & Riggs, alleges:

I. That the United States of America is a corporation created by the Constitution of the United States with its principal offices in the City of Washington, District of Columbia, and plaintiff alleges upon information and belief that within the meaning of the New York Code of Civil Procedure said United States of America is a foreign corporation.

II. That William C. Langley, late of the county of Kings, died on or about the 1st day of December, 1890, seized in fee simple absolute of two certain pieces or parcels of land hereinafter
29 described, located in the Borough of Brooklyn, county of Kings, city and State of New York, and within the territorial jurisdiction of the United States Court for the Eastern District of New York; that said William C. Langley left a last will and testament, which said last will and testament was duly admitted to probate by the surrogate's court of the county of Kings, State of New York, wherein and whereby said William C. Langley devised and bequeathed said premises hereinafter described, together with other property, to certain trustees therein named, to wit: William H. Langley and Charles C. Goodrich, in trust for the uses and purposes and with the powers therein set forth; that a copy of said last will and testament is hereto annexed and made a part hereof marked "Exhibit A."

III. That said William H. Langley and Charles C. Goodrich accepted such trusts and duly qualified as such trustees under said last will and testament and respectively entered upon the duties thereof; that thereafter said Charles C. Goodrich resigned and William F. Dunning was duly appointed as substituted trustee in his place under said will, by order of the Surrogate's Court, County of Kings, State of New York, and said William F. Dunning accepted said trusts and duly qualified as such trustee and entered upon the duties thereof; that thereafter said William F. Dunning died April 1st, 1907, and George F. Benedict was duly appointed as substituted trustee in his place under said will, by order of the Supreme Court, County of Kings, State of New York, and said George F. Benedict accepted said trusts and duly qualified as such trustee and entered upon the duties thereof; that thereafter and on or about June

22nd, 1919, said William H. Langley died and the said George F. Benedict is now and has been since said date the sole surviving trustee under the said last will and testament.

IV. That for many years prior to April 6th, 1918, said William H. Langley and George F. Benedict, as trustees as aforesaid, were the owners in fee and were duly seized and possessed of the following described property, situate, lying and being in the Borough of Brooklyn, City of New York, and State of New York, and situated within the jurisdiction of the United States District Court for the Eastern District of New York; so devised in trust by William C. Langley, as hereinbefore set forth:

"All those certain lots, pieces or parcels of land, situate, lying and being in the Borough of Brooklyn, County of Kings, State and City of New York, more particularly described as follows:

"Parcel No. 1.

"Beginning at the point of intersection of the westerly line of First Avenue and the centre line of Fifty-eighth Street; running thence westerly along the centre line of 58th Street and its prolongation eighteen hundred and twelve feet (1812) and seven inches (7) more or less to the pierhead line established by Chapter 491 of the Laws of the State of New York of 1884 and approved by the Secretary of War on March 4th, 1890; thence southerly along said pierhead line two hundred and sixty feet (260) and four inches (4) to a point opposite the prolongation of the centre line of 59th
31 Street; thence easterly along the centre line of Fifty-ninth Street and its prolongation eighteen hundred and nineteen feet and seven inches (7) more or less to the westerly line of First Avenue; and thence northerly along the westerly line of First Avenue two hundred and sixty feet (260) and four inches (4) more or less to the point or place of beginning, containing approximately four hundred and seventy-two thousand, seven hundred and eighty and one-tenth (472,780.1) square feet.

"Parcel No. 2.

"All that certain lot, piece or parcel of land beginning at the point of intersection of the westerly line of First Avenue and the southerly line of Sixty-third Street and its prolongation; running thence northerly along the westerly line of First Avenue six hundred and sixty-eight (668) feet and one (1) inch to a point one hundred and eighteen feet and one inch northerly from the centre line of Sixty-first Street; running thence westerly at right angles to the westerly line of First Avenue eighteen hundred and thirty-four (1834) feet and five and one-half inches (5½) more or less to the pierhead line above described; thence southerly along said pierhead line approximately six hundred and sixty-eight (668) feet to a point on said pierhead line formed by the intersection therewith of the

southerly line of 63rd St. prolonged; thence easterly along the
southerly line of 63rd St. prolonged eighteen hundred and
32 eighty-two (1882) feet three and three-eighths inches (3⅜)
more or less to the point of beginning, containing approximately one million, two hundred and forty-one thousand, five hundred forty-one and nine-tenths (1,241,541.9) square feet."

V. That on or about April 6th, 1918, all the real property hereinbefore described, except those portions thereof lying in the beds of proposed 63rd Street and 58th Street, between 1st Avenue and the pierhead line as laid out on the Land Map of the City of New York, such streets not yet being opened, and all right, title and interest of the said trustees therein and thereto was requisitioned, commandeered and taken by the United States of America, acting through the President as its duly authorized agent, for an army supply base and expeditionary depot, to provide facilities for the storage of supplies connected with the common defense; that the United States of America, in making said requisition, known as Army Requisition No. 8 B/C, acted under authority of Section 10 of the Food and Fuel Act of August 10th, 1917 (40 Statutes, 279), authorizing the President of the United States from time to time to requisition feeds, foods, fuels and other supplies necessary to the support of the Army or any other public use connected with the common defense, and to requisition or otherwise provide storage facilities for such supplies, and to ascertain and pay a just compensation therefor; and on said 6th day of April, 1918, the United States of America took possession of said premises hereinbefore described, excepting such portions thereof as
lay in the beds of 63rd and 58th Streets, as aforesaid and ex-
33 cluded the said trustees from all right, title and interest therein and from possession thereof, and the United States of America appropriated the said premises to its own use and has ever since retained possession of the same.

VI. That thereafter and on or about May 31st, 1918, such portions of the hereinbefore described property as lay within the beds of proposed 63rd and 58th Streets, between 1st Avenue to the pierhead line, as laid out on the Land Map of the City of New York, such streets not yet being opened, and all right, title and interest of the said trustees therein and thereto, was similarly requisitioned, commandeered and taken by the United States of America, acting through the President thereof as its duly authorized agent, for similar purposes, by supplementary requisition No. 202 B/C, under similar authority, and on May 31st, 1918, the United States of America took possession of said premises and excluded the said trustees from all right, title and interest therein and from possession thereof, and the United States of America appropriated the same to its own use and has ever since retained possession of the same.

VII. That the President of the United States, acting pursuant to the provisions of Section 10 of the Act hereinbefore referred to, in and by the provisions of General Orders No. 30, duly promulgated by the War Department at Washington, District of Columbia, dated

April 1st, 1918, duly constituted and composed in the said War Department a Board of Appraisers composed as therein set forth and charged with duties as therein described, among which
34 duties were to determine by proper methods just compensation for all property requisitioned and commandeered or otherwise summarily taken over according to law for the direct and special use of the army; that thereafter and from time to time the said trustees attended before the Board of Appraisers constituted and composed by General Orders No. 30 hereinbefore referred to, and presented a claim for just compensation for the property requisitioned and commandeered as hereinbefore described, and such proceedings were had by such board that on or about May 2nd, 1919, the said Board of Appraisers made an award, being Award No. 830, for requisitions Nos. 8 B/C and 202 B/C, as hereinbefore set forth, finding that the said property hereinbefore described, in two parcels containing respectively 472,780.1 sq. ft. and 1,241,541.9 sq. ft., was taken for public use by the United States of America, on April 6th, 1918, and May 31st, 1918, respectively, and awarding to the former owners thereof a just compensation for the taking of said property, including the value thereof and damages arising out of the taking thereof, and all charges accrued against or on account of said property prior to the taking thereof, the sum of one million, seven hundred and ninety-six thousand five hundred and twenty-two and 20/100 dollars ($1,796,522.20) with interest thereon at the rate of five per cent. (5%) per annum from May 1st, 1918, to the date of voucher for final payment, a copy of said Award No. 830 being hereto attached and made part hereof marked "Exhibit B."

VIII. That said Board of Appraisers in making said award allowed compensation to the said trustees for the premises re-
35 quisitioned, commandeered and taken at the rate of one and 10/100 dollars ($1.10) per sq. ft. of such premises.

IX. That the Board of Appraisers in making said award unjustly and wrongfully refused to allow compensation to the said trustees for certain strips or parcels of land situated within the boundaries of certain streets laid out on the Land Map of the City of New York, though not yet opened, upon the ground that said lands were not the property of the said trustees, but had been previously conveyed and delivered by the said trustees or their predecessors to the city of New York; that the amount of land for which said Board of Appraisers so refused to allow compensation was estimated at forty-one thousand five hundred and eighty (41,580) square feet on the award hereinbefore set forth, but that the amount of said land for which the United States of America unjustly and wrongfully refused to allow compensation was in fact approximately eighty-one thousand one hundred and twenty square feet (81,120), as appears from report of Board of Appraisers hereto annexed and made part hereof marked "C."

X. That said sum so awarded by the said Board of Appraisers was not the real or reasonable or market value of said real property, but

was far below the real or reasonable or market value of the same; that the said sum was and is not just or proper compensation for the same; that the said board allowed interest on said sum at the rate of only five (5) per cent per annum instead of six (6) per cent per annum, and that said award was unjust and insufficient compensation for said premises.

36 XI. That thereafter the plaintiff duly notified the United States of America that the compensation so determined was not satisfactory to the plaintiff, the plaintiff being the person entitled to receive the same, and rejected the said award, and thereafter plaintiff on or about the 11th day of July, 1918, was paid seventy-five (75) per cent of the amount so determined by the said Board of Appraisers, to wit: The sum of one million three hundred and forty-seven thousand three hundred and ninety-six and 65/100 ($1,347,396.65) dollars, with interest thereon at five (5) per cent from May 1st, 1918, to said date of closing, July 11th, 1919, being the date of voucher for final payment, and the plaintiff conveyed the said property hereinbefore described in fee simple to the United States of America free and clear of all liens and encumbrances in consideration of said amount and such further sum as might be awarded by the United States court as just compensation therefor.

XII. That prior to the said conveyance being accepted by the United States of America the title to the property therein described and hereinbefore set forth had been duly examined by the legal authorities of the United States, who duly reported that the said property was duly vested in the said trustees, as hereinbefore alleged, free and clear from all encumbrances except as to the premises alleged to have been conveyed by the plaintiff's predecessors to the city of New York by deed dated April 25th, 1899, and for which no compensation was awarded by the said board.

XIII. At the time of the taking and appropriation of said property by the United States of America, to wit: April 6th, 1918,

37 said real property hereinbefore described was of the real and reasonable and fair market value of at least three million four hundred and twenty-eight thousand six hundred and forty-four ($3,428,644) dollars, and that nothing less than said amount is just compensation for said property.

XIV. That no part of the said sum of three million four hundred and twenty-eight thousand six hundred and forty four ($3,428,644) dollars has been paid by the defendant the United States of America to the plaintiff, except the sum of one million three hundred and forty-seven thousand three hundred and ninety-six and 65/100 ($1,347,396.65) dollars, being an amount equal to seventy-five (75%) per cent of the said award of said Board of Appraisers.

XV. That the amount to be added to the said seventy-five per cent (75%) of said award to make up an amount which will be just compensation to the plaintiff for said property hereinbefore described, so commandeered, taken and appropriated by the United States of America, is two millon eighty-one thousand two hundred and forty-

seven and 35/100 dollars ($2,081,247.35), with interest on said amount at six per cent (6%) per annum, said amount of six per cent (6%) being the legal rate of interest in the State of New York and the customary rate in said State, from April 6th, 1918, the date of such taking and appropriation by the United States of America, except for such portions of the property as lay within the limits of proposed 63rd and 58th Streets from First Avenue to the pierhead line and as to such portions to date of taking and appropriation by the United States of America, May 31, 1918, and plaintiff is en-
38 titled to interest at the rate of six per cent. (6%) per annum on the value of said property within such streets from such date, May 31st, 1918; and the plaintiff is also entitled to the payment of an additional amount of interest at one per cent (1%) per annum on said amount of seventy-five per cent (75%) of said award, to wit: One million three hundred and forty-seven thousand three hundred and ninety-six and 65/100 dollars ($1,347,396.65) from April 6th, 1918, to July 11th, 1919.

XVI. That there is now due and owing from the United States of America to the plaintiff the sum of two million eighty-one thousand two hundred and forty-seven and 35/100 dollars ($2,081,247.35), with interest thereon as hereinbefore set forth; and also a sum for interest at one per cent (1%) on said sum of one million three hundred and forty-seven thousand three hundred and ninety-six and 65/100 dollars ($1,347,396.65) from April 6th, 1918, to July 11th, 1919.

XVII. That the city of New York is a municipal corporation created and existing under the laws of the State of New York; and that the city of New York by reason of the alleged deed hereinbefore referred to claims an interest, either substantial or nominal, in the streets hereinbefore referred to, adverse to that of the plaintiff, and that no personal claim is made against the city of New York.

Wherefore the plaintiff demands judgment against the United States of America for the sum of two million eighty-one thousand two hundred and forty-seven and 35/100 dollars ($2,081,247.35), with interest thereon at the rate of six per cent. (6%) per annum
39 form April 6th, 1918, as hereinbefore set forth, and for a sum for interest at one per cent (1%) on one million three hundred and forty-seven thousand three hundred and ninety-six and 65/100 dollars ($1,347,396.65) from April 6th, 1918, to July 11th, 1919, together with the costs and disbursements of this action.

GANNON, SEIBERT & RIGGS,
*Attorneys for Plaintiff, Office and P. O. Address,*
*2 Rector Street, Borough of Manhattan, New York City.*

STATE OF NEW YORK,
*County of New York, ss:*

GEORGE F. BENEDICT, being duly sworn, deposes and says:

That he is the plaintiff herein; that he has read the foregoing amended complaint and knows the contents thereof, and that the

same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he belives it to be true.

GEORGE F. BENEDICT.

Sworn to before me this 3rd day of November, 1919.

WILLIAM L. O'CONNOR,
*Notary Public,*
*New York County No. 75;*
*New York County Register No. 1155;*
*Kings County Clerk's No. 17;*
*Kings County Register No. 1027.*

My commission expires March 30, 1921.

40 EXHIBIT A.

In the Name of God, Amen.

I, William C. Langley, of the City of New York, merchant, do make, publish and declare this my last will and testament.

First. I give and bequeath to my son, William H. Langley, one million dollars.

Secondly. I give and bequeath to Charles C. Goodrich, who now is and for many years has been my partner in business, one hundred thousand dollars.

Thirdly. I give and bequeath to Alice M. Bowker (who for many years has resided in my family) an annuity of three thousand dollars, to be paid to her by my executors and trustees in quarter-yearly payments of seven hundred and fifty dollars each, the first payment to be made three months after my death, and thereafter payments shall be made quarter-yearly so long as she shall live.

I direct my executors within six months after the probate of this will to execute an instrument in writing whereby they shall designate three full blocks of my lands in the town of New Utrecht, Kings County, New York, lying between Sixty-third and Sixty-fifth Streets and Third and Fourth Avenues as laid down in the plot of New Utrecht, being continuations of the same streets and avenues as laid down on the map of the City of Brooklyn, and I charge the said annuity as a lien on the three blocks so designated. My
41 executors and trustees may, however, at any time in their discretion sell and dispose of the said three blocks or any part thereof, and in case of such sale or other disposition the lien above created shall cease and the portions sold or disposed of shall after such sale or disposition be free therefrom. They shall, however, substitute in lieu of the lands so released other lands or securities of equal value.

I authorize Alice W. Bowker with the concurrence and approbation of my executors to select from my personal effects such articles as she may require for her personal use. And I give and bequeath to her the articles so selected, such selection to be made by her within three months next after the probate of this my will.

I desire my executors to keep my burial plot in the cemetery at Medfield, Massachusetts, in good order, and I authorize them from time to time to expend for that purpose and for improving and embellishing the same such sums as in their judgment may be proper. In case my son shall wish that his remains or those of his wife and children shall be buried in said plot, I authorize such burial. I also authorize the burial of Alice M. Bowker in said plot if such should be her desire.

Fourthly. If Henry L. Kemp, now in my service, shall be so employed at the time of my death I give and bequeath unto him the sum of five thousand dollars.

Fifthy. I give, devise, and bequeath all the rest and residue of my property of every kind and character, wheresoever situate and that may remain after the payment of my debts and the legacies hereinbefore given to my executors and trustees hereinafter named, to be by them held in trust; that is to say, in trust during the life of my son, William H. Langley, as to my real estate; to demise and let the same from time to time; and as to personal estate to invest, manage, and control the same in their discretion, and to collect and receive the income thereon, and after defraying all charges thereon to pay the net income when received to my said son during his life. And at the death of my son to assign, transfer, and pay whatever may then be held under this trust to his children who may survive him, so that each of his children shall receive an equal share thereof.

42

I hereby authorize and empower my said executors and trustees and their successor and successors to sell at their discretion as to the time and terms and at public or private sale all and every part of my real estate, and to execute and deliver all necessary and proper assurances and conveyances for the same to the respective purchasers thereof.

I nominate, constitute, and appoint my son, William H. Langley, and my friend Charles C. Goodrich to be executors of and trustees under this, my last will and testament, and I desire and hereby request that they shall not be required by reason of nonresidence in this State or for any other cause to give any bond or security either as executors or trustees.

My will is that my said executors and trustees shall not charge or receive any commissions or compensation for their services as executors or trustees. I have had this in my mind in making the bequests herein contained in their favor.

43

Lastly. I hereby revoke all other wills by me made.

In witness whereof I have hereunto subscribed my name at the city of New York on the eighth day of February, one thousand eight hundred and ninety, in the presence of B. F. Dunning, F. P. Fowler, and Wm. F. Dunning, attesting and subscribing witnesses, at the same time declaring this to be my last will and testament.

WM. C. LANGLEY. [L. S.]

Subscribed by the testator in the presence of us and declared by him at the time of making each subscription to be his last will and testament, whereupon we at his request, in his presence and in the presence of each other, have subscribed our names as witnesses, attesting the execution thereof, this certificate having been first read aloud to the testator in his and our presence and hearing.

On the third page in the fourth line the words "wife" "and" were interlined before execution.

B. F. DUNNING,
*37 West 38th Street.*
THOMAS P. FOWLER,
*39 West 68th Street.*
W. F. DUNNING,
*215 West 44th Street.*

44 EXHIBIT B.

WAR DEPARTMENT OF APPRAISERS,
MUNITIONS BLDG., 19TH & B STS.,
*Washington, D. C., May 2, 1919.*

Files Nos. 8 B/C
202 B/C

Award No. 830.

Upon consideration of the facts in this claim, the Board of Appraisers finds that the estate of William C. Langley, deceased, were the owners of certain real estate located at Brooklyn, Kings County, New York, described generally as

All that plot lying between the center line of 58th Street on the north; the centre line of 59th Street on the south; the westerly line of First Avenue on the east, and New York Bay on the west; containing 472,780.1 square feet, more or less; and all that plot lying between a point 88 feet 1 inch north of the northly line of 61st Street, on the north; the southerly line of 63rd Street on the south; the westerly side of First Avenue on the east, and New York Bay on the west; containing 1,241,541.9 square feet, more or less; more particularly described in United States Army Requisition 8 B/C, issued April 3, 1918, and 202 B/C, issued May 24, 1918; excepting thereout approximately 41,580 square feet conveyed to the City of New York by deed, dated April 25, 1899;

45 and that the said property was taken for the public use by the United States on April 6th, 1918, and May 31st, 1918.

Whereupon, this board awards to the former owners as just compensation for the taking of said property, including the value thereof, and damages arising out of the taking thereof, and all charges accrued against or on account of said property prior to the taking thereof, the sum of one million seven hundred ninety-six thousand five hundred twenty-two dollars and twenty cents ($1,796,522.20), with interest thereon at the rate of five per cent (5%) per

annum from May 1st, 1918, to the date of voucher for final payment.

Payment of said award is not to be made until said property has been conveyed to the United States of America, in fee simple, free and clear of all liens and incumbrances, and title thereto has been approved by the proper legal authorities, and that said deed shall contain an accurate and detailed description of property covered by this award.

WAR DEPARTMENT, BOARD OF APPRAISERS,
By J. L. KNOWLTON.
J. L. KNOWLTON,
*Col., General Staff, Acting Chairman.*

A true copy.
Attest:

(Sgd.) EDWARD H. WALTON,
EDWARD H. WALTON,
*Recorder.*

46 EXHIBIT C.

APRIL 22, 1919.

War Department Board of Appraisers.

Requisition Nos. 8 B/C, 202 B/C, 311 B/C, and 613 B/C.

IN THE MATTER OF THE TAKING OF LANDS AT SOUTH Brooklyn, N. Y., for construction of Army base, formerly of estate of William C. Langley, deceased. } Report.

Gannon, Seibert & Riggs, for estate of William C. Langley, deceased.

Lt. Colonel A. E. Clark, J. A., for War Department; Major A. S. Luria for construction division.

1. Under requisition Nos. 8 B/C and 202 B/C there were taken two noncontiguous parcels of land in the borough of Brooklyn, county of Kings, city and State of New York, owned by the estate of William C. Langley, deceased. Each parcel consists in part of upland and in part of land under water in New York Bay, in front of and adjacent to said upland.

Army Requisition No. 8 B/C was issued April 3rd, 1918, and possession was taken and service made on the owners on April 6, 1918. This requisition took all of the land lying westerly of Second Avenue between the southerly line of 58th Street and the northerly line of 63rd Street, including all riparian or literal rights in front of said lands.

Army Requisition No. 202 B/C was issued May 24th, 1918, and served May 31, 1919. This requisition took the southerly half
47 of 58th Street west of the westerly side of First Avenue, and

all of 63rd Street west of the westerly side of Second Avenue, including all riparian or lateral rights to the pierhead line.

2. The lands taken comprise, amongst others, two parcels belonging to Langley estate.

Parcel No. 1 being all that plot lying between the centre line of 58th Street on the north, the centre line of 59th Street on the south the westerly line of First Avenue on the east, and New York Bay on the west, containing 472,780.1 square feet.

Parcel No. 2 being all that plot lying between a point 88 feet 1 inch north of the northerly line of 61st Street on the north, the southerly line of 63rd Street on the south, the westerly side of First Avenue on the east, and New York Bay on the west, containing 1,241,541.9 square feet.

In the report filed by me under date of January 2, 1919, the conclusion was reached that $1.10 is a full, fair price to pay for raw, undeveloped open waterfront between 59th and 63rd Streets, and an award was made to the city of New York on the basis of $1.10 a square foot.

4. No claim was made in this case for land in First Avenue, it being conceded that the land in that area was subject to an easement for street uses. As a matter of fact, it appears that First Avenue, adjacent to the lands taken, was legally opened and William C. Langley was awarded on January 14, 1889, the sum of $.008 as damages by reason of such opening. No allowance should be made to this claimant for land in First Avenue.

48 No legal proceedings were ever had for the opening of 58th, 59th, 61st, 62nd, and 63rd Streets west of First Avenue as far as appears from the data submitted.

The Judge Advocate General advises in his report on the state of the title of the lands under consideration that the trustees of William C. Langley, deceased, by deed dated April 25, 1899, conveyed the fee of 61st, 62nd, and 63rd Streets as far westerly as the high water line of New York Bay, as shown by a plan or diagram attached to or made part of said deed and that "as to such portion of these streets, therefore, lying between First Avenue and the high water line, the city of New York holds the fee title, and as to the portion of such streets between high water line and the pierhead line, as now established by law, the fee is vested in the Langley estate, subject only to the reservations contained in the patent to William C. Langley and the rights of the city of New York of access to New York Bay as the literal or riparian owner of a portion of the waterfront."

He further advises that as to the southerly half of 58th Street and the northerly half of 59th Street, the fee is in the Langley estate. He advises that the fee of 63rd Street west of high water line is in the Langley Estate, and that the Stuyvesant Real Estate Company took by deed to it from Langley, dated September 28th, 1904, no interest or easements in and to 63rd Street.

5. I conclude, therefore, that the Langley Estate is entitled to be paid at the rate of $1.10 a square foot for all land in the areas

mentioned in paragraph 2 hereof, excepting the areas contained within the limits of 61st Street, 62nd Street and 63rd Streets, if projected between the westerly line of First Avenue and the
49 high water line as shown on the map or plan attached to said deed to the city of New York, dated April 25th, 1889

6. At my request, Major Perrine, constructing quartermaster at Brooklyn Army base, measured the areas just mentioned from the map annexed to said deed of April 25th, 1899, and reports the quantities of land conveyed by said deed, as evidences by said map as follows:

Area in 61st Street, 18,240 square feet; 62d Street, 21,300 square feet; 63rd Street, 41,580 square feet, making 81,120 square feet.

It results that the estate of William C. Langley, deceased, is entitled to an award for the lands mentioned for $1,533,202 square feet of land at $1.10 a square foot, amounting to $1,706,522.20.

In the report of January 2nd, 1919, I reported that the Langley estate held the fee of an irregular piece of land, claimed and used by the Stuyvesant Real Estate Company, and over which New York Consolidated Railroad Company had an easement for a right of way, being part of land taken under Requisitions Nos. 311 B/C, served on June 18, 1918, and 613 B/C, served on July 23, 1918.

This place now designed for the purposes of this report, as Langley Parcel No. 3, begins in the westerly side of 2nd Avenue, 40 feet southerly of the northwesterly corner of Second Avenue and 65th Street, extending southerly 10 feet, and of that width westerly in what was formerly 65th Street to the westerly boundary line of the land taken by said requisitions from Stuyvesant Real Estate Company, and contains 1,207 square feet (p. 3 of minutes, Dec. 12, 1918).

50 In my report of January 2nd, 1919, I valued this land at $1 per square foot and an award was made to Stuyvesant Real Estate Company for the land taken from it adjoining the land in question on that basis. This strip was excluded from the area, for which award was made to said Stuyvesant company. There should, therefore, be included in the Langely award the sum of $2,207 for this strip in what was formerly 65th Street.

8. It is recommended that an award issue to the estate of William C. Langley, deceased, in the sum of five hundred twenty thousand fifty-eight dollars and eleven cents for parcel No. 1, herein mentioned, and in the sum of one million two hundred seventy-six thousand four hundred sixty-four dollars and nine cents for parcel No. 2, herein mentioned, and in the sum of twelve hundred and seven dollars for parcel No. 3, herein mentioned, making a total award in the sum of one million, seven hundred ninety-seven thousand, seven hundred and twenty-nine dollars and twenty cents, as and for full compensation for all right, title, and interest of Langley Estate as owner of property taken under any and all requisitions issued for lands at South Brooklyn, and as and for all damages arising from such taking, with interest at 5% per annum on $1,796,-

522.20 (sum 1 and a) from May 1st, 1918, and on $1,207 from July 1st, 1918, to the date of voucher for final payment, upon delivery to the United States by said Langley Estate of a deed, conveying the lands and premises taken by said requisitions free and clear of all liens and encumberances.

RALPH W. E. DONGES,
*Lieutenant-Colonel, U. S. A.*

51 *Answer of the United States of America.*

United States District Court for the Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA AND THE CITY OF NEW York, defendants.

The defendant, United States of America, appearing herein by Leroy W. Ross, United States attorney for the Eastern District of New York, answering the amended complaint of the plaintiff herein, respectfully shows to the court:

First: Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs marked III and IV of said amended complaint.

Second. Denies each and every allegation contained in the paragraphs marked IX, X, XIII, XV, and XVI of said amended complaint.

For a separate and distinct defense, the defendant alleges:

1. That the United States of America is a sovereign power.

52 2. That as such sovereign power, the United States of America can not be sued except in tribunals of its own choosing, or where permission is specifically granted to bring suits against the said United States of America.

3. This suit is brought to recover a sum in excess of ten thousand dollars ($10,000) and the cause of action is based upon an alleged implied contract.

4. That plaintiff alleges that the United States of America is brought into the United States District Court for the Eastern District of New York under the provisions of the act of Congress, dated August 10, 1917, which plaintiff alleges permits actions based upon an implied contract growing out of that act to be brought against the United States of America in the District Court in which plaintiff resides, regardless of the amount sued for; the defendant, United States of America, alleges that any grant of power permitting the United States of America to be sued in a District Court for any sum in excess of ten thousand dollars ($10,000) based on any alleged contract, express or implied, if any such permission were contained therein, was repealed by the Act of March 2, 1919,

and the plaintiff is relegated to his remedy under Section 145 of the Judicial Code.

5. That the United States of America as a sovereign power can not now be sued in the said United States District Court for the Eastern District of New York on any claim exceeding ten thousand dollars ($10,000), but any claim which plaintiff herein has must be presented before the Court of Claims in accordance with sec-
53 tion 145 of the Judicial Code; that this court, therefore, has no power or jurisdiction to entertain this cause of action against this defendant, United States of America.

Wherefore, said defendant United States of America demands judgment dismissing the amended complaint of the plaintiff herein as to it, together with the costs and disbursements of this action.

LEROY W. ROSS,
*United States Attorney for the Eastern District of New York, and Attorney for Defendant, United States of America.*

54 *Answer of the city of New York.*

United States District Court, for the Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA AND THE CITY OF NEW York, defendants.

The defendant, The City of New York, answers the amended complaint herein as follows:

I. On information and belief it denies each and every allegation contained in the paragraph or subdivision of said complaint numbered "IV" except the allegations that for many years prior to April 6, 1918, William H. Langley and George F. Benedict, as trustees of and under the last will and testament of William C. Langley, deceased, were the owners in fee and were duly seized and possessed of such portions of the premises described in said paragraph as are not included in the beds of 61st Street, 62nd Street and 63rd Street from the westerly side of First Avenue to the New York Bay.

II. On information and belief it denies each and every
55 allegation contained in the paragraph or subdivision of said complaint numbered "IX" except the allegations that the lands included within the limits of 61st Street, 62nd Street and 63rd Streets from the westerly side of First Avenue to the New York Bay were not the property of the said trustees but had been previously conveyed and delivered by the said trustees or their

predecessors to the City of New York and that the area of said streets is 81,120 square feet.

Wherefore, the defendant, The City of New York, demands judgment that the complaint as to it be dismissed and that it have such other and further relief as to this court may seem just and proper, together with the costs and disbursements of this action.

WILLIAM P. BURR,
*Corporation Counsel, Attorney for Defendant The City of New York, Office and P. O. Address, Municipal Building, Borough of Manhattan, City of New York.*

STATE OF NEW YORK,
*County of New York, ss:*

GEORGE P. NICHOLSON, being duly sworn, says that he has been duly designated as acting corporation counsel of the city of New York, and as such that he is an officer of the defendant, The City of New York, in the above entitled action. That the foregoing answer is true to his knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those
56 matters he believes it to be true. Deponent further says that the reason why this verification is not made by the defendant, The City of New York, is that it is a corporation; that the grounds of his belief as to all matters not therein stated upon his knowledge are as follows: Information obtained from the books and records of the law department and other departments of the city government and from statements made to him by certain officers or agents of the defendant, The City of New York.

GEO. P. NICHOLSON.

Sworn to before me this 8th day of December, 1919.
[SEAL.] MATTHEW F. DUFFY,
*Notary Public, Kings Co. No. 117; Kings Co. Register's No. 1005; New York Co. Clerk's No. 5; New York Co. Register's No. 1128; Bronx Co. Clerk's No. 9; Bronx Co. Register's No. 2118; Queens Co. Clerk's No. 1201.*

Term expires March 30, 1921.

57 *Judgment.*

United States District Court for the Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA AND THE CITY OF NEW York, defendants.

This cause having come regularly on to be heard, and having been brought to trial before Honorable Edwin L. Garvin, United States

judge, on the 11th, 12th, and 13th days of May, 1920, and the plaintiff and the defendants appearing by counsel, and the parties having stipulated in writing that a jury herein should be waived, and that the case should be disposed of by Honorable Edwin L. Garvin, United States judge, without a jury, and said stipulation having been filed with the clerk, and the said judge having made and filed his decision containing findings of fact and conclusions of law separately stated and numbered, directing judgment as hereinafter stated, and the costs and disbursements of the plaintiff having been taxed against the United States of America by the clerk of this court at $21.30.

58 Now, on motion of Gannon, Seibert & Riggs, attorneys for the plaintiff, it is

Adjudged, that the plaintiff recover of the defendant, United States of America, the sum of two million four hundred and thirty-nine thousand four hundred and seventy-four and 17/100 dollars ($2,439,474.17), and the sum of twenty-one and 30/100 dollars ($21.30) costs and disbursements as so taxed, amounting in all to the sum of two million four hundred and thirty-nine thousand four hundred and ninety-five and 47/100 dollars ($2,439,495.47).

Dated January 5, 1921.

PERCY G. B. GILKES,
*Clerk.*

59 *Opinion.*

United States District Court Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE of the trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA AND THE CITY OF New York, defendants.
December 11, 1920.

Gannon, Seibert & Riggs (William H. Seibert and Royal E. T. Riggs, of counsel), attorneys for plaintiff.

Leroy W. Ross (Charles J. Bachner, special assistant U. S. attorney, of counsel), U. S. attorney, for the Government.

William P. Burr (E. J. Kenney, jr., of counsel), corporation counsel, for city of New York.

This action is brought under the food and fuel act of August 10th, 1917, section 10 of which provides:

"That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the
60 support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled

to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States District Court to hear and determine all such controversies."

The action is at law and a jury and has been waived by consent.

The Government took over a large tract of property, a part of the estate of William C. Langley, deceased, for an Army supply base, on or about April 6th, 1918, fixed its value by a board of appraisers at $1,796,522.20 with interest and paid over 75 per cent thereof, $1,347,396.65 with interest. This valuation was fixed at the rate of $1.10 per square foot. Plaintiff claims that the fair market value of the property on April 6, 1918, was $3,428,644, and that therefore he is entitled to recover $2,081,247.35 with interest at the rate of 6 per cent per annum from the last-mentioned date, and an additional sum represented by the interest at one per cent on $1,347,396.65
61 from April 6, 1918, to July 11, 1919, which was the date of the voucher for final payment, of the latter sum. The only issue is the reasonable value of the property taken.

The city of New York has been made a party defendant because there is a dispute regarding the title to 61st, 62nd, and 63rd Streets, from the westerly side of First Avenue to New York Bay, which lies within the boundaries of the property taken over by the Government. The determination of this dispute does not affect the value of the plaintiff's property. All parties agree that if the city owns these streets the opening thereof would be reflected in the value of the land adjoining; if the Langley estate is held to be the owner, it would use the land in the proposed streets for access to the waterfront upon the improvement of the property. The city claims title under a deed by the trustees of the Langley estate, executed and delivered pursuant to section 992 of the Greater New York Charter, which provides:

"The owners of land and of all the estate herein embraced within the lines of any street laid down and shown on the map or plan of the City of New York, and comprising all the land within said lines in an entire block in extent, may, without compensation, and at their own expense, convey all their right, title, and interest therein, providing the same shall be free from incumbrances inconsistent with the title to be acquired by the city, to the city of New York, and upon delivery of such conveyances to the corporation counsel
62 of said city, with the money necessary to record such conveyances, and affidavits made by all such owners to the effect that the persons making them are the owners of the estates in such lands so conveyed by them, respectively, and stating their interests, and that such estates in such lands are free of all incumbrances, except as aforesaid, together with abstracts of title and complete searches if desired by such corporation counsel, it shall be the duty of such cor-

poration counsel to examine such conveyances and papers, and if such title shall not be rejected for good cause, by such corporation counsel, he shall cause the said conveyances to be recorded in the office in which conveyances of real estate are recorded in the county in which such lands are located within sixty days after their delivery to him, and file them with the comptroller of such city, and thereupon the city of New York shall become vested with the title to said lands to the same effect and extent as if they had been acquired by a proceeding taken for the opening of that portion of said street; after the making and acceptance of such conveyances, no proceedings to open the lands so conveyed shall be taken or maintained, nor shall the lands fronting on that portion of the street so conveyed, and extending to the center of the block on either side of such portion of said street as conveyed, be chargeable with any portion of the expenses of opening the residue or any portion of the residue of such street, except the due and fair proportion of the awards that may be made for buildings as aforesaid."

63 The will of William C. Langley gave to his trustees power of sale expressed as follows:

"I hereby authorize and empower my said executors and trustees and their successor and successors to sell at their discretion as to the time and terms and at public or private sale, all and every part of my real estate, and to execute and deliver all necessary and proper assurances and conveyances for the same to the respective purchasers thereof."

Section 105 of the Real Property Law reads:

"If the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee in contravention of the trust except as provided in this section, shall be absolutely void."

The conveyance by the trustees under the charter was not such a sale as the trustees could make under the will; it was therefore void and the city acquired no title. The provision of the will, giving power to sell, did no more than to confer the right to convey title for a definite consideration. Exemption from possible future assessment for street openings can not be held to be such a consideration.

The question of just compensation must now be determined. That is based upon the market value of the land. This tract was peculiarly valuable as water-front property. In fact there seems to have been no other site in the harbor so desirable. Four experts were offered by the plaintiff, and two by the Government. Experience has revealed that in many cases, expert opinion must be

64 received with caution but in the case at bar there seems to be less reason for rejecting the conclusions of the plaintiff's witnesses than often appears because the reasons which they advance are, generally speaking, sound, and are, in the main, far more convincing than the grounds upon which defendant's witnesses place

their valuation. The latter are well known real estate experts but were not particularly conversant with water-front values on New York Bay. Plaintiff's witnesses as to value include a former borough president, whose official duties would naturally acquaint him to some extent with land values in the Borough of Brooklyn, including water-front property, two real estate men of prominence, and a fourth, Mr. Graham, whose appearance, demeanor, experience and qualifications (which have been heretofore eccepted by city and State as well as by other cities and by numerous conservative and substantial private interests) were unusually impressive and gave to his testimony a weight that can not be disregarded. It is true he has represented and is representing the estate involved, but all who are testifying as to values have an interest and are appearing for one of the parties to the action. The court has reached the conclusion that this is a case where expert testimony can be safely accepted as a basis for a determination of values, unless the doctrine, sometimes advanced, that the testimony of real estate experts must be disregarded, is to be adopted in all cases. With this doctrine the court is not in agreement.

The Government claims that the issue is not the question of what is just compensation but whether or not the measure of value fixed by the War Board of Appraisal is less than the fair
65 and reasonable value. Even if that be conceded, a finding that the value so fixed by said board is less than a fair and reasonable amount is amply justified by the evidence. Plaintiff will therefore have judgment according to the prayer of the complaint.

(Sgd.) EDWIN L. GARVIN,
*U. S. D. J.*

66 *Order striking out separate and distinct defense of the United States of America.*

At the chambers of the United States District Court for the Eastern District of New York, held in the Federal building, borough of Brooklyn, city of New York, on the 19th day of January, 1920.

Present: Honorable Thomas I. Chatfield, United States district judge.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA AND THE CITY OF NEW York, defendants. } L–932.

The plaintiff herein having moved this court for an order striking out the separate and distinct defense interposed in the answer of the United States herein upon the ground that the same is irrelevant and insufficient in law to constitute a defense to the cause of action set

forth in the complaint, and for such other and further relief as to the court may seem just, and the said motion coming duly and regularly on to be heard.

67 Now, after reading and filing the notice of motion herein, the amended complaint and the answer of the United States of America, and after hearing Royal E. T. Riggs, Esq., of counsel for the plaintiff, in support of said motion, and Charles J. Buchner, assistant United States attorney of counsel for the United States of America, in opposition to such motion, and the city of New York appearing herein by Honorable William P. Burr, corporation counsel, and upon due consideration and on making and filing the opinion of the court herein, it is

Ordered that the motion be and the same hereby is granted, and it is further

Ordered that so much of the answer of the United States heretofore filed herein as is included under the heading of a separate and distinct defense to the cause of action set forth in the complaint, beginning with the words "That the United States of America is a sovereign power" and ending with the words "That this court there therefore has no power or jurisdiction to entertain this cause of action against this defendant United States of America" be and the same hereby is striken out as insufficient in law to constitute a defense to the cause of action set forth in the complaint.

THOMAS I. CHATFIELD,
*United States District Judge.*

68 *Bill of exceptions.*

District Court of the United States, Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trust created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA AND THE CITY OF NEW York, defendants.

POST OFFICE BUILDING,
*Brooklyn, N. Y., May 11th, 1920, at 10.30 a. m.*

Before Hon. Edwin L. Garvin, U. S. D. J.

Appearances:

Gannon, Seibert & Riggs, Esqs., by R. E. T. Riggs, Esq., and W. H. Seibert, Esq., of counsel, attorneys for plaintiff.

Charles J. Buchner, Esq., assistant United States attorney, for the Government.

John P. O'Brien, Esq., corporation counsel, by Edward J. Kenny, jr., Esq., for the city of New York.

69 Mr. Riggs opens case to court.

Mr. BUCHNER. I offer in evidence the stipulation as to title in the beds of Sixty-first, Sixty-second, and Sixty-third Streets.

Mr. Riggs. In regard to the stipulation as to title, I am perfectly willing to accept that stipulation with the understanding that the eighty-one thousand one hundred and twenty square feet which was reserved by the United States Government in paying for the full area of the property was because there were eighty-one thousand one hundred and twenty square feet comprised in the beds of Sixty-first, Sixty-second, and Sixty-third Streets from First Avenue to high-water line as they existed on the date of the appropriation.

(Stipulation received in evidence and marked "Gov. Ex. 1.")

Mr. Riggs. May it please the court, I offer in evidence a map of the property of the Langley Estate, dated May 10, 1911.

(Map received in evidence and marked "Plff. Ex. A.")

Mr. Riggs. I offer in evidence a stipulation made between the attorneys for the plaintiff and the United States district attorney.

(Document received in evidence and marked "Plff. Ex. B.")

Mr. Riggs. I offer in evidence copy of the opinion of the Judge Advocate General, dated April 3, 1919, in regard to the title of the Langley Estate requisitioned for the Army supply base, South Brooklyn, New York.

(Document received in evidence and marked "Plff. Ex. C.")

Mr. Riggs. I offer in evidence certified copy of a deed made
70 the twenty-third day of June, 1919, between George F. Benedict, as sole surviving trustee of and under the last will and testament of William C. Langley, deceased, party of the first part, to the United States of America, party of the second part, recorded August 21, 1919, in Liber 3833 of Conveyances, page 242, in the register's office of the county of Kings.

(Document received in evidence and marked "Plff. Ex. D.")

Mr. Riggs. I offer in evidence the original will of William C. Langley, dated the eighth day of February, eighteen hundred and ninety.

(Document received in evidence and marked "Plff. Ex. E.")

Inasmuch as a copy of the will is attached to the complaint and admitted by the answers, I ask leave to withdraw this original.

Mr. Riggs. I offer in evidence certified copy of an order of the Supreme Court of the State of New York, dated September 6, 1907, appointing George F. Benedict, trustee under the will hereinbefore referred to, in the place and stead of said William T. Dumming.

(Document received as Plff. Ex. F.)

Mr. Riggs opens case to court.

George F. Benedict, a witness called on behalf of the plaintiff and duly sworn, testified as follows:

Direct examination by Mr. Riggs:

Q. Where do you reside, Mr. Benedict?

A. North Hackensack, New Jersey.

Q. Are you a trustee of the Langley Estate?

A. Yes, sir.

71 Q. How long have you been a trustee of the Langley Estate?
A. Since nineteen seven.
Q. Is William H. Langley alive?
A. June twenty-second, nineteen nineteen.
Q. That was the date of his death?
A. Yes.
Q. You are the sole surviving trustee?
A. Yes, sir.
Q. Prior to your appointment as trustee were you familiar with the account, bank deposits, and other financial transactions of the trustees of the Langley Estate?
A. Yes, sir; I was for a time, but not the whole time.
Q. Were you familiar with them around April, eighteen ninety-nine?
A. Yes, sir.
Q. Are you able to state whether you have examined those accounts and proceedings with a view to ascertaining whether or not you found a consideration paid in or about that time by the city of New York to the trustees of the Langley Estate?
Mr. BUCHNER. Objected to, if your Honor please. I hardly think it is binding on the Government, and I certainly do not think it is the proper way in which to prove consideration or lack of consideration if that is what it is intended for.
The COURT. Objection sustained.
Mr. RIGGS. Exception.
Mr. KENNEY. I offer in evidence on behalf of the city deed dated April twenty-fifth eighteen ninety-nine executed by William H. Langley and Charles E. Goodrich as trustees of and under the last will and testament of William C. Langley, deceased, to the city of New York, recorded in the office of the Register, in the
72 County of Kings, section eighteen, liber eight of Conveyances, page two sixty-nine.
(Document received in evidence and marked "Exhibit AA.")
Mr. RIGGS. I object to the deed in evidence on the ground that it is void, in that the trustee had no power to make such deed and on the ground that the city of New York had no power to accept the same in so far as it relates to the property comprised in the beds of Sixty-first, Sixty-second, and Sixty-third Streets between the westerly side of First Avenue and high-water mark.
The COURT. Don't you gentlemen think the proper thing is to receive this deed in evidence and then I will have the facts, and just brief that later whether or not it is incompetent evidence and in that way the whole question can be determined.
The objection is overruled and deed received in evidence with the understanding that the question with respect to the title conveyed by it is to be discussed by counsel.
Mr. KENNEY. I offer in evidence communication dated June twenty-first, eighteen ninety-nine, addressed to Bird S. Coler, comptroller of the city of New York.

Mr. RIGGS. Objected to.

The COURT. Objection overruled. Same reservation as to previous exhibit.

(Document received in evidence and marked "Exhibit AA–1.")

73 Mr. KENNEY. I offer in evidence affidavit of William H. Langley and Charles C. Goodrich verified April twenty-five, eighteen ninety-nine.

Mr. RIGGS. Objected to.

The COURT. Same ruling.

(Document received in evidence and marked "Exhibit AA–2.")

Mr. KENNEY. I offer in evidence certificate of Title Guarantee & Trust Company dated May second, eighteen ninety-nine.

Mr. RIGGS. Objected to.

The COURT. Same ruling.

(Document received in evidence and marked "Exhibit AA–3.")

Mr. RIGGS. I reserve an exception if upon examination the court retains the foregoing documents in evidence.

By Mr. RIGGS:

Q. Mr. Benedict, do you remember the occasion of the delivery of this deed by Mr. Langley and Mr. Goodrich to the city of New York?

A. No, sir; I do not.

Q. Do you remember anything in regard to it?

A. No, sir, I had nothing to do with it.

Q. Did you have charge of the account for the trustees at that time?

A. Not at that time, no.

74 CHARLES E. TROUT, a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. RIGGS:

Q. Where do you reside?

A. Staten Island.

Q. What is your business?

A. I am engineer for Henry Steers (Inc.) at the present time.

Q. Prior to that time what was your business?

A. Engineer and superintendent for Turner Construction Company in charge of the water front work at the Army supply base.

Q. And prior to that time what was your position?

A. I was assistant engineer to the department of docks and ferries, city of New York.

Mr. RIGGS. I offer this map for identification marked "Survey sheet No. 27, red, produced by the department of docks and ferries of the city of New York under subpoena duces tecum.

(Document received in evidence and marked "Exhibit G" for identification.)

By Mr. RIGGS:

Q. Mr. Trout, will you look at this plaintiff's Exhibit G for identification and state whether or not this map shows the high-water line as it existed in eighteen ninety-eight between Sixty-third Street and Fifty-eighth Street?

A. It shows part of it only, Mr. Riggs. This only extends to Sixty-first Street.

Mr. RIGGS. I offer for identification sheet No. 28 produced by the department of docks and ferries of the city of New York.

(Document received in evidence and marked "Exhibit H" for identification.

75 Q. Will you look at plaintiff's Exhibit H for identification and state whether or not that shows the high-water line along Bay Ridge, say from Sixty-third to Fifty-eighth Street, as of eighteen ninety-eight?

A. Map twenty-eight red shows the high-water line as of eighteen ninety-eight from Sixty-third to Sixty-first Street, and map twenty-seven red shows the high-water line as of eighteen ninety-eight from Sixty-first to Fifty-eighth Street.

Q. At the request of the plaintiff, Mr. Trout, have you made a computation of the number of square feet comprised in the beds of Sixty-first, Sixty-second and Sixty-third Streets from the westerly side of First Avenue extending to the high-water mark as of eighteen ninety-eight, as taken from these maps?

A. I have.

Q. Will you tell what that area is?

Mr. BUCHNER. Objected to, on the ground it is absolutely immaterial.

The COURT. I think I will take it, and if I conclude later that it was incompetent or immaterial I will so indicate in the memorandum and disregard it in the determination of the issue.

Mr. BUCHNER. Exception.

By Mr. RIGGS:

Q. Within the lines of Sixty-first Street?

A. Eighteen thousand and ninety square feet.

Q. Within the lines of Sixty-second?

A. Nineteen thousand four hundred and forty square feet.

Q. Within the lines of Sixty-third?

A. Twenty-one thousand two hundred and forty square feet. Total fifty-eight thousand seven hundred and seventy square feet.

76 Q. How long have you been familiar with the high-water line as it existed on that shore, Mr. Trout?

A. Since about nineteen five.

Q. And what was its condition at that time with reference to filling in by the Brooklyn Rapid Transit Company?

A. About that time——

Mr. BUCHNER. Objected to. I do not quite understand the question myself, if you mean in these three streets.

Mr. RIGGS. In the vicinity of Sixty-third Street.

A. At about that time the Brooklyn Rapid Transit was filling in this block south of Sixty-third Street, and they had no retaining structure to prevent their material from flowing over into the property to the north.

Q. Did you see that work being done?

A. I was there at the time occasionally.

Q. When was that work of the Brooklyn Raipd Transit Railroad Company completed?

A. My memory is it was completed in nineteen six.

Q. Can you describe the difference between the high-water line on the Langley property extending north from the south side of Sixty-third Street as it was prior to work done by the Brooklyn Rapid Transit Company and as it was after the work done by the Brooklyn Rapid Transit Company?

A. Prior to the work done by the Brooklyn Rapid Transit Company the high-water mark ran across Sixty-third Street north and south, after that work it bulged out at both the south line of Sixty-second Street in an approximate quarter circles to Sixty-third Street, where they, the B. R. T., had a crib, on the front of its property.

77 Q. Did you have anything to do with the excavation of this fill for the United States Government?

A. I did.

Q. What was the nature of this land?

A. It was heavy material, a very large percentage of cobble-stones.

Q. Are you familiar with the character of soil added by excavation to lands around high-water mark upon New York harbor and upon the bay?

A. I am.

Q. Was this soil which you excavated for the United States Government of that character?

A. It was not.

Mr. BUCHNER. Objected to. I do not think that is material.

The COURT. Objection overruled.

Mr. BUCHNER. Exception.

Q. Are you able to state, Mr. Trout, the area added between the high-water line of 1898 and the high-water line which existed in 1918 of the fill of the B. R. T.?

A. I am not able to state that in figures excepting in that corner where the fill overflowed from the B. R. T. fill the high-water line was substantially unchanged in nineteen eighteen when we began our work at the Army base.

Q. Would it be possible for you, for the information of the court, to plot the high-water line of eighteen ninety-eight upon this plaintiff's Exhibit A of this date?

A. Yes, I think so.

Q. Are you able to state the difference, if any, between the high-water line of nineteen eighteen as appears from the Dock Department map?

The COURT. I understood you to say that the only substan-
78 tial difference was that caused by the fill from the Brooklyn Rapid Transit?

A. Quite right.

Cross-examination by Mr. BUCHNER:

Q. If I understand you correctly, Mr. Trout, there has not been any change in any of that water-line north of the B. R. T. plot, south of Sixty-third?

A. That is true.

Q. When was that?

A. If my memory is correct, in nineteen six, but I didn't look up the date.

Q. Which one of these lines show high-water mark in eighteen ninety-six?

A. The blue line.

Q. That light blue line?

A. The light blue line.

Q. Between eighteen ninety-eight and nineteen eleven isn't there almost as much difference south of Sixty-third Street here going in shore between those two lines as there is fill in north of Sixty-third Street; in other words, isn't this just as far out from line of nineteen eleven as this is inside of it (indicating on map)?

A. There is not anything like the amount of change.

Q. This blue line, is that the one that you talked about as the line in eighteen ninety-eight?

A. No, sir, that is not. That is a green line that you pointed to, the blue line is here [indicating on map].

Q. This is the line you are talking about, this blue line?

A. Yes, sir.

Q. Was all this property here [indicating] filled in by the B. R. T.?

A. As I tried to explain in my testimony, the B. R. T. filled in the property south of Sixty-third Street, but they had no retaining structure on the south line of Sixty-third to prevent that material from flowing over onto the property on the north.

79 Q. Who built that concrete wall in there?

A. The Turner Construction Company, for the United States Government.

Q. When?

A. In nineteen eighteen.

Q. That was not in there at the time in eighteen ninety-eight when you are talking about?

A. No, sir; it was not the high-water line then; it ran along in approximately a straight line three hundred feet or so.

Q. How close to eighteen ninety-eight did you ever see the new high-water line down there?

A. I did not visit the property until about nineteen five.

Q. And then in nineteen thirteen the next time?

A. Yes, sir.

Q. So that for those fifteen years there has not been any record kept of how much change there was in the high-water mark?

A. No.

Q. Is there any way in which you have worked out how much of that, or have you just approximated how much of that was in any one year?

A. I have not attempted to say.

Q. Then all that your testimony here means, as I understand it, is that in eighteen ninety-eight there was a certain area from First Avenue as was then high-water mark, whether that changed in the next couple of months or next couple of years you haven't any idea?

A. The map itself contains the evidence that there was little change because the area to the north of that bulge shows the high-water line in 1913 and subsequently approximately as it was surveyed in 1898, the only essential change being where the B. R. T. fill ran over on the property north of Sixty-third Street.

Q. That was in 1913?

A. Yes, sir.

80 Q. But you won't approximate how much of that fill went over in any one year between 1898 and 1913?

A. No.

By the COURT:

Q. You are only testifying with respect to an alleged change in the bed of Sixty-third Street, and you have no recollection at all to Sixty-first or Sixty-second Streets?

A. There has been no change in those streets.

Mr. RIGGS. There is a very slight change in Sixty-second, but it is practically all Sixty-third.

By Mr. BUCHNER:

Q. The high-water mark across any one of these streets is not a perfectly straight line?

A. It is not a straight line in any point.

Q. Did you plot out each foot of this land in figuring this area?

A. No, sir.

Q. Did you take the mean average between the ends of the street?

A. I did.

Q. Did you figure at any time how much difference there is between the high-water mark in 1898 and 1913 at the foot of these streets?

A. No.

Q. You didn't figure that either?

A. No.

Q. So that your figures are not based upon the same figures as the stipulation which we are using in this case?

Mr. RIGGS. Objected to. He does not know anything about the stipulation.

The COURT. He may say so.

A. I say that.

Q. But you have never figured how much difference there
81 is in actual area between the high-water mark in '98 and high-water mark in 1913 at the foot of Sixty-third Street, have you?

A. No, sir.

Q. Or Sixty-second Street?

A. No, sir.

Q. Or Sixty-first Street?

A. Nor Sixty-first Street.

Q. Do you know what the area is now on Sixty-first, Sixty-second, and Sixty-third Streets from First Avenue to the high-water mark in 1918, did you ever make that calculation?

A. No.

Q. Your figures were from First Avenue to the high-water mark in 1898?

A. The only computation I have made in regard to the case is the areas of those three streets between the west side of First Avenue and high-water line as shown on these survey sheets of 1898.

Redirect by Mr. RIGGS:

Q. Take this map and point out to the court the line indicating the line of high water in 1898.

(Witness explains Ex. H to the court.)

Q. How many high-water lines and of what dates do these two maps G and H for identification show?

A. Between Sixty-first and Sixty-second Streets they show three, and between Sixty-second and Sixty-third four.

Q. As of what dates, Mr. Trout?

A. Of 1898; I beg your pardon, it shows three throughout. One of these is the top. There are three lines and they are of the dates of 1898, 1907, and 1913.

Q. Now looking at these maps, Mr. Trout, is there any difference between the high-water line at the foot of what would be Sixty-first Street if prolonged of 1898 and of 1907?

A. The line of 1907 does not go back quite as far as that.

82 Q. Is that answer true of Sixty-second Street?

A. It is also true of Sixty-second Street; the line runs up to the line of Sixty-second and I suppose a little short of south side of Sixty-second.

Q. Would it be possible for you to compute if requested the amount of square feet area between the line of 1898 and the line of 1913 at the foot of Sixty-first and Sixty-second Streets?

A. Yes, sir.

By Mr. BUCHNER:

Q. And at Sixty-third?

A. The same is true there.

Q. There is a considerable recession between 1907 and 1913 at the foot of Sixty-third Street?

A. Yes, sir.

Q. In 1907 about how far out was the high-water mark than 1915?
A. About eighty to ninety feet.

By Mr. RIGGS:

Q. Now, Mr. Trout, I show you map which I ask to have marked as "Plaintiff's Exhibit 1" for identification.
(Received as Plaintiff's Exhibit 1 for identification.)
Q. Now, this plaintiff's Exhibit 1 for identification is labeled map showing the Langley property, South Brooklyn, New York, dated June 12, 1911, map showing contour lines? [Witness examines map.]
Q. Were you familiar with the Langley property about the date of requisition in April, 1918?
A. I was.

83 Q. What, if anything, did you do upon that property for the United States Government?
A. I made soundings all over the submerged part of it.
Q. Were you connected with the company which did the actual improvement of that property for the United States Government?
A. Yes, sir,
Q. And did that in the course of your work?
A. I did.
Q. At my request have you compared the soundings which you took in April, 1918, with the contour lines as they appear upon this map, plaintiff's Exhibit 1 for identification?
A. Soundings were taken early in May as nearly as I can tell from my memory of them. This map shows substantially the same depth of water.
Q. So that you would say that that map shows substantially the contour lines of the property as it existed at the time of requisition by the United States Government?
A. Yes, sir.
Mr. RIGGS. I offer map in evidence.
(Received as Plaintiff's Exhibit 1.)

LAWRENCE A. BOWE, a witness called on behalf of plaintiff, having been duly sworn, testifies as follows:

Direct examination by Mr. RIGGS:

Q. What is your residence?
A. 632 Bergen Street, Brooklyn.
Q. Are you employed in the department of docks and ferries?
A. Yes, sir.
Q. Have you produced in court in response to subpoena duces tecum the two maps, plaintiff's Exhibits G and H for identification?
A. Yes.

84 Q. Are those maps produced from the official files of the Department of Docks and Ferries of the city of New York?
A. Yes, sir.
(Maps received in evidence and marked respectively Plaintiff's Exhibit G and Plaintiff's Exhibit H.)

Cross-examination by Mr. BUCHNER:

Q. All you know is that they are official maps?

A. Yes, sir.

WILLIAM H. SEIBERT, a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. RIGGS:

Q. Are you a member of the firm of Gannon, Seibert & Riggs, attorneys for plaintiff?

A. I am.

Q. How long have you been attorney for the Langley Estate?

A. I have represented the Langley Estate since 1896, associated with other attorneys, and since 1907 myself.

Q. How long have you been familiar with the property of the Langley Estate at Bay Ridge, Brooklyn?

A. Since 1893.

Q. Up to what date?

A. Up until shortly before the time of taking by the Government, I should say in February, 1918.

Q. You recall the circumstances with regard to the Langley Estate property in or about 1899 as it existed between the westerly side of First Avenue and high water mark?

A. I do.

Q. Will you describe that condition?

85 A. The property at that time was a sandy shore. A portion of it was occupied by a life saving station under the charge of the city of New York. That was about between Sixty-second and Sixty-third Street. There was an old farm house on the land north of Sixty-first Street, and some people used the shore front for the building of boats from time to time, but no structures of any moment were on the property except the farm house.

Q. Was the property fenced in along First Avenue?

A. The property was not fenced in along First Avenue until, I think, 1906 or 1907, when I had it fenced in for the trustee.

Q. Did you see the fence after it was erected?

A. I did.

Q. Was the property fenced along the south side of Sixty-third Street?

A. No, there was a wall along the south side of Sixty-third, but a wooden fence ran up along the westerly side of First Avenue and from thence up to a point about eighty-eight feet north of Sixty-first Street and then down to the water line on the northerly side of the property.

Q. Did that fence run across the beds of what are laid down on the map as Sixty-first, Sixty-second and Sixty-third Streets between the westerly side of First Avenue and high water mark?

A. Yes.

By the COURT:

Q. Then the fence ran along First Avenue?

A. It did.

By Mr. RIGGS:

Q. What change, if any, in the physical condition of the property occurred between 1899 and 1918?

86 A. After the Langley Estate had sold a portion of this property to the Stuyvesant Real Estate Company, I think in 1904, it was improved by the Stuyvesant Real Estate Company or somebody else or their grantees and was filled in, and after that filling in the contour of the shore front extended out very materially in Sixty-third Street, how far I do not know, but very noticeable.

Q. At any time were there any streets opened on this property?

A. Never.

By the COURT:

Q. Is this the filling in that has been described by one of the witnesses as B. R. T.?

A. Yes; I understand the Pennsylvania Company exchanged with the B. R. T.; the B. R. T. ultimately took the property instead of the Pennsylvania or the Stuyvesant Real Estate Company.

By Mr. RIGGS:

Q. There never had been any streets actually opened between First Avenue and the high water mark from 1899 down to the date of the requisition?

A. Never.

Q. During all that time was that property in the physical possession of the Langley Estate?

A. It was.

Mr. RIGGS. I offer in evidence award made by the War Department Board of Appraisals to the city of New York, dated June 25, 1899, No. 591.

Mr. KENNEY. Objected to. We have not asked for any relief, and we can not get it in this proceeding.

Mr. RIGGS. I will withdraw the offer of the award No. 591 upon that stipulation.

87 Mr. RIGGS. I offer in evidence a plan for improving the water-front harbor of the city of New York between Twenty-eighth Street and Sixty-first Street, South Brooklyn, Borough of Brooklyn, dated by the Commissioner of Docks May 31, 1906, and by the Commissioners of the Sinking Fund of the City of New York, June 20, 1906.

(Document received in evidence and marked "Plaintiff's Exhibit J.")

Mr. RIGGS. I offer in evidence a plan for improving the water front between Sixty-second and Sixty-third Streets, South Brooklyn, made in accordance with law and dated by the dock commissioner

February 25, 1914, and adopted by the commissioners of the sinking fund April 8th, 1914.

(Document received in evidence and marked "Plaintiff's Exhibit K.")

JOHN F. MURPHY, a witness called on behalf of the city of New York, having been duly sworn, testified as follows:

Direct examination by Mr. KENNEY:

Q. Are you employed by the city of New York?

A. Yes, sir.

Q. In the borough president's office, borough of Brooklyn?

A. Yes, sir.

Q. Topographical division?

A. Yes, sir.

Q. Are you acquainted with the map commonly known as Town Commissioners' Survey Map?

A. Yes, sir.

88 Q. Have you got a copy of that map or one of the original maps filed in your office in the Borough of Brooklyn?

A. Yes, sir.

Q. Now, in answer to a subpoena served upon your office have you produced here a copy of that map?

A. I have.

Q. And does this copy of the map show lines of the street as laid down on that Town Commissioner's Map of Kings County?

A. Yes.

Q. As they existed in April, 1899?

A. Yes, sir.

Q. Do you know of this deed made by the trustees of the Langley Estate to the city of New York?

A. Yes.

Q. And you know that deed conveys certain streets in the Borough of Brooklyn?

A. Yes, sir.

Q. I show you a map and ask you if this is a copy of the map, of the Town Commissioner's Survey Map, Kings County, so far as the same relates to Sixty-first, Sixty-second, and Sixty-third Streets west of First Avenue?

A. Yes, sir; the lines in black on this map.

Q. The lines in black on this map show the lines of those streets on the Town Commissioner's Map of Kings County?

A. Yes, sir.

Mr. KENNEY. I offer that map in evidence.

(Received in evidence and marked "City Exhibit BB.")

By the COURT:

Q. Do you know when that was made?

A. The map was filed 1874.

By Mr. RIGGS:

Q. What is the official name?

A. It is commonly called the Town Survey Commissioner's
89 Map of Kings County. That is the working sheet we have in the office to note all the changes.

Q. Does the official name of it appear anywhere on the copy?

A. Not on that copy; no.

Q. And when you state the official name of it are you repeating accurately and exactly what appears on the original?

A. Substantially, yes, but I do not know just what the words are on the title page.

Q. You are not sure of the exact words?

A. No. I am not sure of the exact words.

Mr. KENNEY. I offer in evidence chapter 676 of the Laws of 1869.

(Received in evidence and marked "City Exhibit CC.")

Mr. KENNY. I offer in evidence chapter 581 of the Laws of 1874.

(Received in evidence and marked "City Exhibit DD.")

Mr. KENNEY: I offer in evidence chapter 451 of the Laws of 1894.

(Received in evidence and marked "City Exhibit EE.")

By Mr. KENNY:

Q. Does this map offered in evidence by Mr. Murphy, show the lines of Sixty-first, Sixty-second and Sixty-third Streets, west of First Avenue, in 1899?

A. Yes, sir.

Q. And this map show the lines of said streets west of First Avenue up until the amendment, the plan offered in evidence by the dock department in 1906?

A. It still shows them.

Q. And it showed the outline also, the two plans offered in evidence of the dock department by Mr. Riggs a moment ago?

A. I believe they are indicated on that map.

90 Mr. KENNEY. I offer in evidence chapter 992 of the Greater New York Charter.

(Received in evidence and marked "City Exhibit FF.")

Cross-examination by Mr. RIGGS:

Q. This map which has been marked in evidence as "City Exhibit BB" is a copy of the map on file in the borough president's office?

A. Yes, sir.

Q. What is the official title upon the sheet of the original of which this map is a copy?

A. I do not know what the official title is, I haven't got it here.

Mr. RIGGS. I will concede that at the date of the deed made by the trustees of the Langley Estate to the city of New York, in April, 1899, the property of the Langley trustees was owned by them in fee simple and unincumbered by any liens or mortgages.

Mr. KENNEY. Will you also concede that the Langley Estate at the date of the deed owned the block south of Sixty-third Street that you subsequently conveyed to Stuyvesant?

Mr. RIGGS. Yes; and at the time of the conveyance referred to the property of the Langley Estate consisted also of a block to the south extending as far as, I think, Sixty-fifth Street.

(Mr. Riggs outlines position of plaintiff to the court.)

(Recess taken until 2 p. m.)

91 THOMAS P. GRAHAM, a witness called on behalf of the plaintiffs having been duly sworn, testified as follows:

Direct examination by Mr. RIGGS:

Q. Where do you reside?

A. 150 Broadway, Manhattan.

Q. How long have you been in the real estate business?

A. For twenty-five years.

Q. During that time where have you been engaged in the real estate business?

A. Part of the time in Brooklyn and the last fifteen years in the Borough of Manhattan.

Q. Have you during that time of twenty-five years in the real estate business, have you made a special study of any class of real property?

A. Specialized in commercial waterfronts on New York Harbor.

Q. Have you acted as principal and broker?

A. I have.

Q. Have you acted as appraiser for institutions?

A. I have.

Q. Have you acted as expert witness in condemnation proceedings?

A. I have.

Q. And in certiorari proceedings?

A. I have.

Q. And in other proceedings and acts affecting real property?

A. I have.

Q. Now, will you state to the court some of the sales of waterfront property you have made, confining yourself to the last ten years, giving the locality and the year, if possible; but, of course, not the price?

A. I sold what was called the Bergen property, Bergen Estate property, a block front running from First Avenue out to the pier headline of 1857—Fifty-third-Fifty-fourth Street, South Brooklyn.

Q. What year?

A. Nineteen fifteen.

92 Q. Where is that property situated?

A. In South Brooklyn between Fifty-third and Fifty-fourth Street, running west of First Avenue.

Q. What other property have you sold?

A. I sold for the Kent Estate part of the property upon Sixty-first Street, running from west side of First Avenue to the pier headline. That was in 1904. I sold property at the foot of North First Street which is the Williamsburg section. I sold property in Greenpoint section, having a frontage of 900 feet on the East River.

I sold property in Bayonne, New York Harbor, known as Deleno property, in 1917. In 1916 I sold property on North River and Forty-ninth Street, fronting on Hudson River, Borough Manhattan. I sold property foot of Houston Street, facing on East River, in Manhattan. I sold property foot of South First Street, East River; that was in 1918; block front, water front. That is all I can bring to my mind now.

Q. And those sales you have enumerated are sales in which you have acted as broker within the last ten years upon the water front?

A. Yes.

Q. Have you appraised property upon the water fronts in the City of New York, and if so, for what institutions?

A. I have appraised for the State of New York, for the City of New York· Jersey City, Hoboken, Pennsylvania Railroad Company, Baltimore and Ohio Railroad Company, Lehigh Valley, Long Island Railroad Company, Central Railroad of New Jersey, the Standard Oil Company, the American Sugar Refining Company, the New York Dock Company, the Dickinson estate and the Langley estate.

Q. You have appraised property of the Havemeyer Estate?

A. Yes, I appraised that for the State comptroller. That
93 was the Brooklyn Eastern district terminal property, consisting of about eight blocks of water front. I appraised that for the State comptroller.

Q. Now, will you enumerate some of the proceedings in which you have testified as expert real estate appraiser and the name of the persons for whom you did the appraising?

A. I appeared for the city of New York in what is known as the Thirty-ninth Street Ferry condemnation, South Brooklyn. I appraised for the Langley Estate in 1912 for part of this property. I appraised for the city of New Jersey and the city of Hoboken all the water front from Hoboken to Bayonne and testified as to its value, about five or six miles, before the State tax board. I appraised the property known as the Whale Creek matter in the Greenpoint section for the city of New York. I was expert for the city at that time. I appraised the property foot of Borden Avenue, Long Island City, and acted as arbitrator in determining the value between Long Island Railroad and Pennsylvania.

Q. Have you ever appraised for the Central Railroad of New Jersey?

A. I was expert for the Central Railroad of New Jersey.

Q. Have you ever testified for the Brooklyn Rapid Transit?

A. Yes; foot of North Seventh Street. I appraised piers numbered twenty-seven and twenty-eight on the East River, Manhattan.

Q. Are these appraisals which you have mentioned of property situated on the water front all over the harbor of the city of New York?

A. All water-front property.

Q. That is, you have sold property and appraised and also testified as expert as to water fronts in Manhattan?

A. I have.

Q. And in Brooklyn?

A. I have.

94 Q. And on the Jersey shore?

A. Yes.

Q. And Staten Island?

A. Yes. I have just recently made an appraisal for the Baltimore & Ohio between Tompkinsville and Clifton for the purpose of testifying in condemnation proceedings just being inaugurated.

Q. For the Baltimore and Ohio Railroad Company?

A. For the Baltimore and Ohio Railroad Company.

Q. And had the appraisals necessitated an examination on your part of the water front of the harbor of the city of New York and the various boroughs?

A. Yes.

Q. Are you familiar with the value of water-front property upon the New Jersey shore of the Hudson River?

A. I am.

Q. Are you familiar with water-front value upon the west side of Manhattan Island?

A. I am.

Q. And upon Staten Island?

A. I am.

Q. And upon the Brooklyn shore?

A. I am.

Q. So your experience has taken you over the entire harbor of the city of New York in the last twenty-five years as broker and as appraiser?

A. Yes.

Mr. Riggs. Any cross-examination as to qualifications?

Mr. Buchner. No.

Q. Mr. Graham, how long have you been familiar with the South Brooklyn water front?

A. Twenty years or more.

Q. Will you please describe for the court the situation of the Langley property involved in this proceeding?

A. This is the Langley property (pointing to map of the city of New York prepared by the Board of Assessment and Ap-

95 praisement), indicating foot of Sixty-fifth Street, South Brooklyn.

Q. Will you state the dimensions of the Langley property a little more particularly, Mr. Graham?

A. The smaller parcel begins at the point on the westerly side of First Avenue, which would be the center line of Fifty-eighth Street if extended, runs then westerly along the said center line if extended 1,812 feet and 7 inches to the pier headline, then southerly along said pier line 260 feet 4 inches, then easterly at right angles, or nearly so to pier head line, 1,819 feet 7 inches to westerly side of First Avenue, and thence northerly along the westerly side of First Avenue 260

feet 4 inches to the point or place of beginning, having an area of 472,780 square feet. Plot B, as we call it, is a larger plot, beginning at a point on the westerly side of First Avenue 111 feet 11 inches south of the southerly line of Sixtieth Street if extended, thence running westerly to pier head 1,834 feet 5½ inches to pier head line, thence southerly along pier head 668 feet 1 inch, thence easterly at right angles, or nearly so, to pier head 1,883 feet 3⅜ inches to the westerly side of First Avenue, and thence northerly along the westerly side of First Avenue 668 feet 1 inch to the place of beginning; 1,241,541 square feet and 9 inches.

Q. Between the two parcels of the Langley Estate what property is there?

A. Property belonging to the city of New York, 422 feet.

Q. In width?

A. In width.

Q. Now, divide the period between 1895 and 1918 into two parts, and taking first the period from 1905 to 1908. Into two parts, first from 1895 to 1908 and then for ten years 1908 to 1918, will you
96 state to the court what developments have taken place along the South Brooklyn shore of the waterfront?

A. About 1895 the South Brooklyn waterfront was almost wholly undeveloped. There were one or two small developments at the foot of Thirty-seventh Street, the terminal that ran to Coney Island and the Seabeach Railroad, Sixty-fifth Street, running to Manhattan Island.

Q. What is that map [referring to map produced by the witness]?

A. This map shows the development to Sixty-fifth Street.

Q. Did you prepare that map, Mr. Graham?

A. Yes; it was prepared at my request.

Q. And from what did you compile it?

A. From information we had and from dock department maps, etc.

Q. And you did it for the purpose of showing by way of explanation the various improvement along the South Brooklyn shore for that space of waterfront?

A. That is so.

Mr. Riggs. I would like to have the map marked in evidence.

(Document received and marked "Exhibit L.")

Q. Where is the point known as Owl's Head?

A. To the south of this [indicating].

Q. About the foot of Sixty-ninth and Seventieth Streets?

A. About that.

Q. When was the property from Sixty-ninth Street from Owl's Head to Coney Island acquired by the city of Brooklyn?

A. I should say that was about 1900.

Q. Since the acquirement by the city of New York of the property from Owl's Head, Brooklyn, what other property has been acquired by the city of New York from Twenty-seventh Street to
97 Sixty-third Street?

A. All the property from Twenty-seventh to Thirty-sixth Street.

Q. When was that acquired by the city?

A. 1908. The city purchased all the property west of Second Avenue to the pierhead line between Twenty-eighth and Thirty-sixth Street, and also the property between the center line of Fifty-ninth Street to the point 111 feet south of center line of Sixty-first. They were both purchased at the same time by the city of New York in 1908.

Q. When did the Bush Terminal Company acquire its property?

A. About 1902.

Q. What property did they purchase and what did they do with it?

A. They purchased all the property on the water front between Forty-fourth Street and Fifty-first Street and eight upland blocks east of First Avenue, and then an additional purchase between Forty-ninth and Fifty-first Street, and proceeded to start this water front development of theirs with piers and warehouses and connecting railways.

Q. What has the city of New York done with the property it purchased between Twenty-eighth and Thirty-sixth Streets?

A. It built five piers.

Q. How long were those piers?

A. The piers are anywheres from twelve hundred feet to eighteen hundred feet long, and the narrowest pier is about eighty feet wide to one hundred and fifty feet wide, having slips of three hundred and fifty feet between.

Q. Were those the largest piers anywhere in the city of New York?

A. They are.

Q. How long are the Bush Terminal Piers?

A. Approximately one thousand feet; they are wider than the city piers.

98 Q. From the Bush Terminal property south to Sixty-third Street, will you please, taking the blocks one by one, enumerate the owners and the class of improvement which has been effected in the particular block you are describing in the last twenty years?

A. The city purchased that block between Fifty-first and Fifty-second Streets, the first block south of the Bush Terminal, for a naval armory, and they built a naval armory on it, and it is occupied for that purpose.

Q. What time?

A. Around about 1900 or 1901.

Q. What is the next ownership?

A. The next ownership one hundred feet on the west side of First Avenue running to the pierhead line of 1857, purchased by the Brooklyn City Railroad Company, on which they have a power station and storage yard. That is what it is occupied and used for

to-day. The other half of the block was purchased by the Bliss people, who used it as a forge shop for projectiles.

Q. You mean the E. W. Bliss Manufacturing Company?

A. The E. W. Bliss Manufacturing Company. The other half of the block between Fifty-second and Fifty-third Streets. Both those properties were filled out to what was the bulkhead line at that time. Immediately adjoining that was what was known as the Old Bergen property, which I sold in 1915.

Q. What was south of the Bergen property?

A. South of the Bergen property was the Kings County Lighting Company, which located there previous to 1900.

Q. When you speak of all of these companies or businesses as having located in that section, you mean that those businesses and companies were so located in April, 1918, at the time of the purchase of the Langley property by the Government? That is, was this all previous to the appropriation by the Government and all existing at the time of that appropriation?

99

A. All existing at the time. The adjoining property, the Kings County Lighting Company, between Fifty-fifth Street and Fifty-sixth Street and a short distance of Fifty-seventh Street is Morse Dry Dock Company.

Q. What is the business?

A. Repairing and renovating ships and dry docks, general ship repairing business.

Q. Is that one of the largest plants in the city of New York?

A. It is one of the largest in New York Harbor. Immediately adjoining that, between Fifty-seventh and Fifty-sixth, is the Kenyon property.

Q. What improvements had been made in the way of manufactur-

A. A pier fourteen hundred feet long, and warehouse or factory buildings built on the upland

Q. What improvement had been made in the way of manufacturing buildings?

A. The upland was improved my manufacturing building; the Kenyon Company used this.

Q. Will you trace for the court where the pierhead line of 1890 is situated?

A. (Indicated.)

Q. How far is that from First Avenue?

A. Something over eighteen hundred feet.

Q. And upon the Langley property, undeveloped property, the high water was about four hundred and ten feet wide on the westerly side of First Avenue, and running to the pierhead line?

A. Approximately, a little less.

Q. At the foot of Sixty-first Street?

A. Approximately four hundred feet.

Q. And along that shore the city of New York has constructed piers eighteen hundred feet long?

A. They have to the south of it; yes.

100 Q. Will you indicate to the court also where the bulkhead line is?

A. About here [indicating].

Q. The bulkhead or the pierhead line as laid down by chapter 763 of the Laws of 1857?

A. I believe so.

Q. And beyond that point it was not liable to fill it?

A. Beyond that point it was impossible to fill in.

Q. Will you state to the court where this property between Twenty-seventh Street and Sixty-third Street, South Brooklyn, how much was unimproved property in April, 1918?

A. The property from the center line of Fifty-eighth to south side of Sixty-third Street, only the property in question. The Langley property and city of New York property, running from center line of Fifty-eighth to southerly side of Sixty-third, west of First Avenue.

Q. That was the only property that was vacant and unimproved property in the section in 1918?

A. Waterfront property.

Mr. Riggs. At this point I would like to introduce in evidence map entitled "Pierhead and Bulkhead Lines for the Easterly Shore of East River, Buttermilk Channel, Upper New York Bay," such pierhead and bulkhead lines being approved by the Secretary of War of the United States as of March 4, 1890.

(Document received and marked "Exhibit M.")

Q. Now, Mr. Graham, you have described the improvement to the north of the Langley property extending to Twenty-sixth Street; will you please describe what improvement, if any, that has been effected to the property south of the Langley property from Sixty-third Street south?

101 A. New York Connecting Railroad has developed a railroad terminal from Sixty-fourth to Sixty-sixth Street, and then there is just below Sixty-sixth Street, the Edison Electric Company, a power station on the water front, and adjoining that is a piece of vacant property belonging to the E. W. Bliss Estate, and then a water-front park development from there down to Fort Hamilton. There is one pier at Sixty-ninth Street.

Q. And that is all in the ownership of the city of New York for park purposes from Owls Head south?

A. Yes.

Q. And between the New York Connecting Railroad Company terminal and the Langley property what was the property?

A. There was a piece belonging to the B. R. T., which was taken by the Government at the same time this property was taken.

Q. South of the property and immediately adjoining it was the terminal of the Brooklyn Rapid Transit Company?

A. Yes.

Q. And to the south of that the terminal of the New York Connecting Railroad Company?

A. Yes.

Q. And to the south of that the electric light company that you have spoken of?

A. Yes.

Q. When was the New York Railroad Company open for traffic?

A. As a connecting railroad along about 1912 or 1913.

Q. And where does the freight transported by the New York Connecting Railroad come from?

A. It originates in the East connected with the West by the great trunk lines and crosses Long Island Sound at Astoria.

Q. Over the connecting bridge through Long Island City
102 to Sixty-fifth Street and from Sixty-fifth Street cross to the Pennsylvania terminal at Greenville by car floats?

A. Yes.

Q. The property from Owls Head south is not suitable as a development for commercial purposes?

A. It is impossible because it is in the city ownership for park purposes. It was condemned for that purpose.

Q. Now will you state, Mr. Graham, some of the factors that are necessary for large steamship developments at the present time?

A. Deep water, space for adequate slips, adequate size and length of piers, adequate space for warehouse and for rail connections and accessibility.

Q. Now will you describe which of those factors, if any, apply to the Langley property at the time of the requisition?

A. They all apply. As to accessibility the Fourth Avenue subway leads into the property from New York inside of twenty minutes. It has a sufficient area for the development of three or four piers of approximately fourteen hundred to eighteen hundred feet in length, with adequate slip room. It has a rail connection, the New York Connecting Railroad and the Bush Terminal Railroad having franchises on First Avenue connecting both the Connecting Railway and the Bush Terminal Road. It is admirably located as to the channel. The pier head line is one hundred feet from the Bay Ridge channel, which has a width of two thousand feet and an average depth of forty; it connects directly with the Ambrose channel.

Q. The pierhead line is about forty feet from the channel?

A. It is about 100 feet.

Q. From the edge of the channel?

A. Yes.

Q. When was that channel completed to a depth of 40 and width of 2,000?

A. About 1916 or 1917 to its present depth and width.
103 That channel was started along about 1900 and originally had a depth of about 16 feet, then it was dredged to a depth of 35, having a width of 700 feet; then it was finally widened to 1,400 feet, having a depth of 35 feet, and along about 1916 and finished about 1917 it was dredged to 40 feet, with a width of two thousand feet.

Q. What was the depth of the water, if you know, at the pier headline? In all of these questions, Mr. Graham, confine yourself to April, 1918, the date of the taking by the Government, without making it necessary for me to repeat it.

A. I presume—I do not absolutely know—something like 25 to 35 feet.

Q. Shown as on this contour map?

A. Yes.

Q. In the harbor of the city of New York will you please state where at the time of the taking similar property to the Langley property existed?

A. There was only one piece in New York Harbor undeveloped at that time; that was on Staten Island.

Q. That is property of the Baltimore & Ohio Railroad Company which you have been retained to appraise?

A. Yes.

Q. What advantages had the Langley property over the property on Staten Island that you speak of?

A. It was much more available for assembling cargoes; it was not so isolated. No freight or business originates on Staten Island; everything has to be brought over, while immense quantities of manufactured articles and warehouse goods are located in Long Island and cargoes originate on the Brooklyn shore and not on the Staten Island shore.

Q. Upon the eastern New Jersey shore was there any prop-
104 erty similar in character to the Langley property?

A. On what we call on the west shore of the harbor. There is no channel. The pierhead or bulkhead line is something like 7,000 feet offshore and the Government pierhead line is something like 12,000 feet offshore. There is no depth of water.

Q. You are referring to that part of the Jersey shore south of Hoboken and extending to Staten Island?

A. I am talking about the property from Communipaw Bay to Bayonne which is called the westerly side of New York Harbor. That property would not be susceptible for pier development unless the Bay Ridge Channel is duplicated.

Q. Confining your attention for the moment to New Jersey and the Hudson River, was there any property there similar in character to the Langley property?

A. No; there have been some sales of property on the eastern shore of New Jersey. The Cunard Steamship Company has acquired from the Delaware & Hudson Railroad and New York Central and West Shore about 3,000 feet running from Weehawken to Hoboken, but there is no room for warehouses unless they make the room, and if they put adequate warehouses there they can not get over 800-foot pier and then north of that we find the same condition.

Q. Will you state to the court what other similar property there was anywhere in the harbor that could be compared in character as similar to the Langley property at the date of the taking?

A. The only one is the Baltimore & Ohio property on the easterly shore of Staten Island from Tompkinsville to Clifton.

Q. What, in your opinion, has been the course of value in
105 waterfront in the city of New York since 1910, for instance?

A. Upward in value.

Q. What factors enter into the value of property?

A. Demand and supply, increased demand, decreasing supply.

Q. Has it been the policy of the city of New York to acquire existing water fronts of the city of New York for a great many years?

A. Yes.

Q. About how much water fronts capable of development into piers, 1,400 or 1,500 feet, was there left in private ownership about April, 1918?

A. I do not know of any except this property. The Langley property and possibly the property on the Staten Island shore.

Q. The Staten Island shore was capable of development?

A. Capable of development for piers of 1,000 feet to 1,200 feet.

Q. What would you say as to the demand for water-front property in the period from 1908 to 1918, whether it was increasing or decreasing?

A. It was increasing. The South Brooklyn shore suffered from the fact that the city had proposed a plan in 1906 for the improvement of that water front, thereby taking it out of the market from the ordinary purchaser. No private individual would buy a piece of water front and develop it with a pier with the city plan on it and run the risk of having it taken away from him the moment it was developed.

Q. By a city plan you mean a city plan for development after condemnation?

A. After condemnation. It was notice to intending purchasers that the city was going to take that property, and they refused to negotiate for it on that ground. When it was taken off purchasers became interested, then the Kerr Pier was built by the Ken-
106 yons, and from that time on the development around the harbor became intense because of the demand.

Q. By Kerr and Kenyon people you mean the Kenyon people owning property immediately adjoining to the north of the Langley property improved it by a pier and manufacturing buildings, and leased the pier to the Kerr Steamship Company?

A. In 1916.

Q. Was this property belonging to Mr. Kenyon and also to the Langley Estate being condemned by the city of New York from the year 1906 to 1913?

A. It was.

Q. And those proceedings by the city of New York were pending during all those seven years?

A. Yes; and I think that was taken off by Kenyon, who did not improve his property, and could not any more than Langley could.

Q. Now, you said something about the demand for water-front property; how greatly had it appreciated from 1913 to 1918?

A. Why, it increased in my opinion anywhere from 25 to 43 per cent in value. The demand to-day can not be met. I have demands every day for piers, for berthing spaces that I can not supply. The demand was so great that it forced the Cunard Steamship Company to go up to Weehawken.

Q. What proportion, if you know, of the foreign trade the city of New York gets through the port of New York?

A. New York is the premier port of this country. Practically 50 per cent of the imports and exports go in and out New York Harbor in spite of the fact that the Government tries to allocate freight steamship companies in other ports to relieve the pressure.

Q. What would you say as to whether the tonnage of the
107 port of New York had been increasing year to year during those ten years from 1908 to 1918?

A. It did until 1914, when the submarine peril was so great that the shipping was tied up, but since that time both imports and exports have increased.

Q. And the tonnage has constantly increased except for the year you speak of, when the submarine peril was great in the beginning of the war?

A. Yes.

Q. What you say is merely as to the number of ships entering and leaving the port of New York as to the ten years referred to, whether it has increased or decreased?

A. That has increased except during the submarine peril.

Q. That is, both the tonnage and number of ships have increased?

A. Yes.

Q. What in your opinion, Mr. Graham, was the Langley property best adapted for in 1918?

A. Building of long piers with adequate slips, warehouses, and railroad terminals.

Q. What in your opinion would have been the nature of a similar improvement for that property?

A. Practically the *the* same as the Government put on.

Q. And practically the same as the Bush Terminal?

Mr. BUCHNER. I submit that the last is not an answer, practically the same as the Government put on.

The COURT. Assume that you do not know anything about what the Government put on.

Q. Disregard what the Government did. Will you state what improvement you think would be a suitable improvement?

A. Long piers 1,400 feet in length and warehouses.

108 Q. Long piers about 1,400 feet in length and what width?

A. One hundred feet in width.

Q. Shedded piers?

A. Shedded piers.

Q. And connected with the mainland by what marginal street?

A. By marginal street to the warehouse on the upland and both pier and warehouse connected by railroad.

Q. By Bush Terminal?

A. Along First Avenue.

Q. Do you know how the Bush Terminal Railroad is classified as a freight carrier?

A. You can get a basic rate from the Bush Terminal the same as on the Jersey shore. There are no switching charges.

Q. The Bush Terminal Railroad delivers freight to its customers on a flat New York rate, does it not?

A. Flat New York rate.

Q. And all other terminals in the City of New York charge an extra charge?

Mr. BUCHNER. Objected to.

By Mr. BUCHNER:

Q. In 1918 there was not any connection with the Bush Railway and this property?

A. In 1918 there was a franchise along First Avenue.

Q. But there was no physical connection?

A. No physical connection, it was on First Avenue, but did not run into the property.

The COURT. Ran past the property?

Mr. BUCHNER. That was the B. R. T.

A. That was the Bush Terminal Railroad. The Bush Terminal Railroad had a franchise running from Sixty-third to Thirty-ninth. There were no trolley cars.

109 Q. Do I understand you to say in 1918 there was an actual physical laying of these tracks from Bush Terminal down as far as this property on First Avenue?

A. Yes, the Bush Connecting Railroad had tracks there.

Q. Down past this property on First Avenue?

A. Yes, sir; they had a franchise for it.

By Mr. RIGGS:

Q. Have you been the agent for this property, Mr. Graham?

A. I have.

Q. For how many years?

A. Twenty years.

Q. When did you first value this property for the purpose of appraisal?

A. About 1904–5–6—somewhere around there.

Q. About how many appraisals have you ever made of this property?

A. I appraised the value of this property and testified in the condemnation proceedings in 1912, I think three or four parcels of it.

Q. Did you testify for the Langley Estate before the War Department Board?

A. I did, in 1918.

Q. Have you testified for the Langley Estate upon other occasions in the last ten years in which value has been questioned?

A. I have.

Q. How long have you been familiar with the property physically?

A. Twenty years.

Q. Now, will you please state, Mr. Graham, what was the value of the real property belonging to the Langley Estate requisitioned and taken by the United States Government on or about April 16, 1918?

A. Three million four hundred and twenty-eight thousand six hundred forty-three dollars and eighty cents.

Q. Now, assuming Mr. Graham, that at the time of the
110 requisition by the United States Government the land comprised within the beds of Sixty-first, Sixty-second, and Sixty-third Streets was owned by the City of New York from First Avenue to the then existing high-water mark for street purposes, what was the value of the property requisitioned by the United States Government?

A. The same.

Cross-examination by Mr. BUCHNER:

Q. How do you figure that value, do you use a unit, Mr. Graham?

A. Yes.

Q. What unit?

A. Two dollars per square foot.

Q. And if you use two dollars per square foot and you took that property from the bed of Sixty-first, Sixty-second, and Sixty-third Streets from the west side of First Avenue to the high water mark, which you may take in my question, would amount to 81,120 square feet, would you still say that you had not to make a deduction?

A. That I had not to make a deduction? It would be reflected in the adjoining piece.

Q. Do you figure the value of this property on the unit of a square foot, or do you figure on the reflected value, that is what I want?

A. If the streets were not there when this property was improved, approaches would have to be made to the water front, and I figure these streets would be just as valuable for that purpose as any.

Q. You really did not use the square-foot unit as a measure of value when you gave your calculation?

A. Yes, I did.

Q. Didn't you figure what you thought was the value of the property and then divide it by the number of square feet?

A. What difference is that?

111 Q. Isn't that what you did as a matter of fact?

A. Practically.

Q. And isn't it actually what you did?

A. It may be actually.

Q. Isn't that the way you always figure value of this sort?

A. Yes.

Q. So that as a matter of fact you figure the value of a certain piece of property and then divide the number of square feet in it to get the value of the square foot unit, isn't that the unit?

A. Yes.

Q. Do you take into consideration the amount of water front there is in this piece of property when you fixed value?

A. Yes, sir.

Q. Does that make any difference?

A. Yes, I figure every foot of ground west of First Avenue has the same value.

Q. You do not actually figure that every square foot of those two different strips belonging to the Langley estate is of the same value?

A. Yes, sir.

Q. You did?

A. I did.

Q. Does it make any difference whether they are altogether or in small strips?

A. I take them as I find them [indicating on map].

Q. In your calculation does it make any difference to you whether they are altogether or separate strips?

A. It depends on the size; if they are susceptible of adequate improvement it does not make any difference.

Q. Are they susceptible of adequate improvements?

A. Yes, sir.

Q. What did you say those piers should be?

A. Fourteen hundred feet.

Q. How wide?

A. One hundred feet.

Q. How much space between them?

A. One hundred and fifty to two hundred feet.

112 Q. That small strip there, how wide is that?

A. Two hundred and sixty feet.

Q. How many piers can you put on it?

A. One.

Q. Then you have 160 feet left?

A. Yes. I have 107 feet on the northerly side of that pier which I can use.

Q. Why?

A. Because I have a right to use that water.

Q. How much of it?

A. All.

Q. How much does the city have a right to use?

A. Just as much as it was necessary for them to approach their pier.

Q. As much as they needed?

A. Yes.

Q. Did you know that when you were figuring how many piers you could put on it?

A. Yes, sir.
Q. How many piers could you put on the larger strip?
A. Either two or three.
Q. And on the smaller strip, how many piers do you say that you could put there?
A. One.
Q. Three piers?
A. Yes, sir; on both parcels.
Q. Do you know anything about tide conditions, wind and water down there?
A. Yes, sir; I do.
Q. How does it compare with the rest of New York harbor?
A. You may get a little more ice in there than in some other parts of New York harbor.
Q. You will, won't you?
A. It depends.
Q. As a general thing does the ice pile up there and stay longer than in any other part of the harbor?
A. No, it is not a general thing, you will find ice in the slips on the west side of Manhattan.
Q. What piers?
A. Any of them from Chambers Street north.
Q. Take two or three of them.
A. Any of them from Chambers Street. The ice comes down the Hudson River.
113 Q. Does it pile up the way it does in Brooklyn?
A. It does.
Q. Do you know anything about the tide conditions?
A. Yes; I have sailed over it.
Q. Are you a ship owner?
A. No.
Q. Are you interested in shipping?
A. I am interested in everything connected with the water front.
Q. Where do you get your idea of the number of ships in New York Harbor?
A. From the Chamber of Commerce report.
Q. Why didn't you tell him?
A. I do not know why.
Q. He asked your opinion and what you gave was the Chamber of Commerce report?
A. Yes.
Q. It is not your opinion?
A. He did not ask my opinion.
Q. He asked what in your judgment was the increase?
A. Yes.
Q. While we are on the subject of shipping, you say 1914 was the only time there was a slump in tonnage in the harbor of New York?
A. Around 1914–15.

Q. As a matter of fact when you talk about the tonnage in the harbor did you talk about the tonnage in ships that came in, or did you take the ships that go in and out for commercial purposes?

A. Commercial, I am not talking about express passenger ships.

Q. Did you figure the ships that the Government was using in 1917–18 for the transportation of troops and material for carrying on the war?

A. No.

Q. You excluded them?

A. I did not take particularly those.

Q. Now, do you say that, excluding those ships for com-
114 mercial, the tonnage in New York Harbor was as high in 1908 as it was in 1916?

A. I am not talking about 1908.

Q. Nineteen eighteen, I should say, as high as it was in 1916?

A. Yes; in nineteen eighteen it was as high as in 1916.

Q. Commercial tonnage, excluding the Government transportation and ships they were using to transport troops and material for the war?

A. Yes.

Q. On what do you base that?

A. On reports that I have.

Q. Let me see them?

A. (Witness examines book.) I have here a report of the annual report of the Chamber of Commerce of the City of New York.

Q. For what year?

A. Nineteen sixteen and seventeen.

Q. Have you any later?

A. No; I haven't.

Q. Well, then your measure of amount of tonnage was an assumed guess in 1918, wasn't it?

A. No; it was not an assumed guess.

Q. How do you base it?

A. I read it every day, I read reports of all kinds, and they all give me information that I want how the tonnage has been increasing, the number of ships has been increasing.

Q. Will you tell me, Mr. Graham, the number of tons, the gross tonnage of the ships that came into the harbor in 1918, that you base the value of this property on?

A. I did not base the value of the property on that amount.

Q. Doesn't the tonnage of the shipping have anything to do with the value of dock property?

A. That is one of the things that you take into consideration.

115 Q. The most accessible sheet of water in the world where no ships would go would not be worth a dollar for dock property?

A. No; but I fail to see that New York Harbor is a desert, that its wharves are lying idle, that there are no ships coming in and going out, that there is not tonnage. I know that there was anywhere

from fifty to one hundred ships lying in the roadstead in 1918–19 that could not get berthing spaces.

Q. You know that?

A. I know it.

Q. What did you have to do with it?

A. I had demand for them.

Q. For these ships?

A. For berthing space.

Q. Tell me what ships you had demand for berthing space in 1918?

A. I cannot tell you off-hand now.

Q. Why do you base your opinion as expert on something that you cannot recall?

A. I cannot recall the names of the ships. If you give me time I will get them. If you want them to-morrow you can have them.

Q. How many did you have?

A. I will tell you to-morrow after I locate it.

Q. A small number?

Q. Quite a number.

Q. Do you know any of them at all, I am asking as to your recollection?

A. My recollection is that there was a demand for berthing space that could not be supplied.

Q. You understand my question; I am asking you if you can answer now that you recall the name of any ships that you had demand for the berthing space in April, 1918?

A. I know there was a demand for berthing space.

Q. The Government had taken over a large number of these piers, hadn't it?

A. Of course they had.

Q. Isn't that what made the demand so high?

A. No.

116 Q. Did it help?

It helped.

Q. How many piers on the South Brooklyn front did the Government take over that had been used for commercial purposes previous to April 6th, 1917?

A. Practically all the Bush piers and one or two of the city piers from Twenty-seventh Street to Thirty-sixth Street.

Q. That is what made it hard for the commercial company to get their space?

A. Yes; that is so.

Q. Had you figured that in there, that condition as a part of the measure of the value of this property of the Langley?

A. I figured there was a demand for pier purposes.

Q. Now had you figured that demand in the value you put on the Langley property?

A. No; I valued this Langley property at two dollars per square foot before the war.

Q. You valued it at two dollars in April, 1918?

A. Yes; I valued it at two dollars before April, 1918.

Q. I want to know on this particular value that you make in April, 1918, whether or not this unusual demand for berthing space caused by the Government having taken over commercial piers, whether that was a part of your element in the measure of your damage?

A. It was not.

Q. You had not that in consideration at all?

A. Not whatever.

Q. Did you, in figuring how much this Langley property was worth, take into consideration how much work would have to be done there and the cost of it before this would be usable as pier property?

A. Yes.

Q. How long do you thing it would take them to build that pier in 1918 when the war was on?

A. Six months probably.

117 Q. Do you think they could have gotten men and material enough in six months to have built those piers?

A. Well, the Government considered the necessity of piers, and many piers were built during that period.

Q. Do you know of any piers that were built by private concerns with the help of the Government during that time?

A. No; but I know piers were built for individuals for their own private business.

Q. How much dredging do you think they would have to do there?

A. I know it cost $150,000 to dredge the slips in the Kerr Pier.

Q. When?

A. 1916–1917.

Q. Labor was cheaper then, wasn't it?

A. Yes; it was a little less than 1918.

Q. Considerably less, wasn't it?

A. It was less of course, it had gone up considerably in 1917.

Q. Going up considerably higher in 1918?

A. I think they were higher.

Q. Materially?

A. I understood it cost the Government sixty-five cents a cubic foot.

Q. How much do you think it cost the Kenyon people to dredge themselves a cubic foot?

A. About fifty cents.

Q. Do you know?

A. That is a figure that was given to me.

Q. Where did you get that?

A. From the contractor that did the work.

Q. How far out do you think the Langley Estate, if it were building piers on that property, would have to dredge?

A. They would have to start to dredge at the bulkhead line and dredge out until they got to the channel.

Q. So that they would have to dredge at the bulkhead and then one hundred feet?

A. Yes.

118 Q. What depth would they have to go?

A. About thirty-five feet, I suppose, in those slips.

Q. When you gave your testimony before the Army Board of Appraisers, you mentioned the fact that that property would be particularly fitted for the Cunard or White Star Line, didn't you?

A. No, I didn't; I said it might be used for passenger ships.

Q. Didn't you mention the Cunard Line?

A. Not that I remember.

Q. Do you know how much water you have to have in the slips for the Cunard?

A. It depends on which boat you have.

Q. You have to have it big enough to accommodate every steamer they have if you are going to use it for passenger service, haven't you?

A. No; they might not allocate all ships there.

Q. Now, Mr. Graham, in the first port of this country, as you say, would it be the logical thing for the White Star Line to pick their good ships and send them to another port?

A. The Cunard sends it passenger ships to the west side and its smaller passenger ships to Hoboken. I said it might be used for passenger ships, and I haven't the slightest recollection of mentioning either the Cunard or White Star Line. If you can show it to me in my testimony I would like to see it.

Q. Why do you say a fourteen hundred foot pier if you are not going to bring big ships?

A. Because you can berth more than one here.

Q. How many ships do you figure you can put alongside of those piers?

A. At least four.

Q. How big do you think the "Imperator" is; the "Aquitania;" the "Lusitania," and "Titanic?"

A. They are all under nine hundred feet.

119 You could not put them alongside of a fourteen hundred-foot pier?

A. No; you could put one on each side.

Q. You could not put two of those ships on a fourteen hundred-foot pier that was only one hundred feet wide and disassemble passengers and freight without having congestion?

A. You could not put two nine-hundred-foot ships on opposite sides of a fourteen-hundred-foot pier.

Q. You could not?

A. It might be a little narrower for the "Imperator" and "Aquitania," "Lusitania" and "Leviathan," but you are naming four of the largest ships.

Mr. RIGGS. I object to the introduction of what the witness said before the Board of Appraisers unless his testimony is pointed out.

Q. I understood you to say here today, Mr. Graham, that you thought this property was particularly fitted for passenger service?

A. I said it might be used for passenger service, but I did not testify for the White Star or Cunard.

Q. Do you think it is available for passenger service?

A. I think it could be, not for the "Aquitania," "Lusitania," "Leviathan," or "Imperator," or any of those.

Q. Or any of the great big ones?

A. Yes.

Q. Did I ask you how deep that would have to be?

A. For an ordinary ship, thirty-five to forty. That is the depth of the channel.

Q. Do you know what the depth of the water at this point is, at the pier line?

A. By referring to the map I can tell you. [Examines map.] Twenty to twenty-five feet.

Q. So that practically forty feet of it would have to be dredged out between the two piers all the way between about one hun-
120 dred and fifty feet of the pierhead, and that one hundred feet would have to have about fifteen feet dredged?

A. Yes.

Q. And carry that fifteen feet all the way out to the channel?

A. Yes.

Q. Did you figure the cost of that, sir, of the improvements in measuring the value of what the property as it lay was?

A. I saw some engineers' figures.

Q. Do you think that the Langley Estate property down there physically is as good as anything on the water front?

A. You are asking a very wide question; name the water front.

Q. On the South Brooklyn water front?

A. Yes.

Q. You think it is as good as any?

A. Yes.

Q. Did you always think so?

A. Yes.

Q. You said you were one of the experts in the Morse Dry Dock Company case?

A. Yes.

Q. Do you remember this being asked you, this question, and you making this answer?—"Q. I will ask you this, would you consider this a better class of property than the Langley and Kenyon property?—A. It is in a better physical condition and is equally as good."

A. It was a better physical condition.

Q. That is what I asked. If the physical condition of this is as good as any?

A. The Morse Dry Dock was a developed piece of property. I still believe what I said; yes.

Q. Do you think that made a difference in the value of the Morse?

A. Part of it.

Q. How much more valuable than Langley did that make it?

A. I do not remember now. You have my testimony; take it and read it.

Q. That does not tell me how much more valuable than the Langley you thought the Morse?

A. My idea, as I expressed at that time, you have the difference between a property that had some development and a piece of property in its native state with no development.

121

Q. The Langley had no development in 1918?

A. No.

Q. It could not be used for a single thing unless improvements were put on it?

A. It had potentiality.

Q. That is all?

A. Location.

Q. Then why was there such an increase in value in it, as you have testified to, between 1895 and 1918?

A. Because there was an increase in demand in that class of property.

Q. You say that it is better or worse than Staten Island?

A. I think it is worth more than Staten Island.

Q. You think it is?

A. Yes.

Q. You are going to testify as an expert in that?

A. Yes.

Q. For the Baltimore and Ohio?

A. Yes.

Q. The same attorneys, Messrs. Gannon, Seibert and Riggs, they represent the Baltimore and Ohio?

A. I do not know, I was retained by the Baltimore and Ohio.

Q. Don't you know?

A. I know Mr. Riggs is in it.

Q. You know that?

A. I do not see anything sinister about it.

Q. I do not either.

A. Oh, excuse me.

Q. How many sales did you make either as principal or broker or anything else between 1910 and 1918 of the property that is commonly called the South Brooklyn water front?

A. Sale of the Bergen property.

Q. When was that?

A. 1915.

Q. That the only one?

A. I think that is the only sale that was in there between Twenty-seventh and Sixty-fifth Street.

Q. The only sale of water-front property that you made in 1918, if I understand correctly, was the pice at the foot of South First Street, is that right; that was in Brooklyn; water-front property?

122

A. I sold a piece in Baltimore.

Q. You would not call that in Brooklyn?
A. Oh, no. In Brooklyn that is about the only piece.
Q. How big a strip was that?
A. Two hundred feet.
Q. Two hundred foot front?
A. Yes, entirely different class of property.
Q. Entirely different?
A. Yes.
Q. You could not use it as a measure of value in this plot?
A. No.
Q. Did you say that the Bergen property was the only property that you sold?
A. Yes.
Q. That was what year?
A. As I remember, along in 1915.
Q. How big a strip was that?
A. A strip having a frontage of 200 on First Avenue, the same width running back as far as high water line, 200 feet on First Avenue running back as far as high-water line. The streets were open to the north and south.
Q. Is that the pier line that street?
A. Of 1857.
Q. That is not the pier line in use in this Bergen property?
A. Yes.
Q. I should have said in this Langley property?
A. No.
Q. How far beyond that?
A. Six hundred feet. The Bergen property did not own that 600 feet.
Q. Who did?
A. It belonged to the State of New York.
Q. You say you could put three piers on this property 1,400 feet long, now what else were you going to put on it?
A. The upland was going to be improved with warehouses.
123 Q. What kind of warehouses?
A. Any kind necessary for use there.
Q. You had not worked that out?
A. I am not an engineer or builder.
Q. You plotted out what you thought was a good plan?
A. I took the figures of the engineer. You will get the figures; I think they are all here.
Q. You figured that three piers was enough to use on that property; now how many warehouses?
A. I had many negotiations with the city of New York as to the exchanging of this 260 feet, after practically giving us one whole piece, the city of New York owned, attempted or thought of attempting of developing that 422 feet without taking into consideration the development of the Langley property. They only had room for one pier.

Q. You knew that?

A. Of course. The city of New York was in between us and they had to consider us and they could not put a pier there without going into arrangements with the Langley property.

Q. They could put a pier easily on their property, easier a great deal than you could on your small strip?

A. They might, but it would not be an adequate property development.

Q. You know quite a bit about waterfronts, real estate, regulations, and things of that sort?

A. You flatter me; yes, I think I do.

Q. You know about the city charter restrictions on the use of piers?

A. I knew there was an old provision that you could not build a pier less than seventy feet wide and within one hundred feet of another.

Q. You also know that they can not build a covered pier
124 without getting special permission from the department?

A. I know they do build covered piers.

Q. You know they have to have permits from the dock department?

A. It is never refused.

Q. You know they have to have it?

A. Yes; exactly the same as you have to to put a building up in any other place.

Q. It is the same sort of thing?

A. I rather think so.

Q. A matter of right?

A. Any pier, as I remember, for steamship or railroad purposes, is entitled to a shed, but if the property is condemned with a pier and a shed on it, it is to be condemned as an unshedded pier and not as a shedded pier.

Q. Is that the only provision?

A. I think that is the only one.

Q. Don't you know it makes a considerable difference as to the measure of valuation of a pier whether it is a shedded or unshedded pier?

A. What?

Q. Does it make any difference as to the value of the property whether you have a shedded or unshedded pier?

A. I know a shedded pier is worth more than an unshedded pier.

Q. Why?

A. Because you cannot use the dock to the same extent.

Q. Is that the only reason?

A. Yes.

Q. Don't you know that if you build an unshedded pier in the city of New York that you must let anybody tie up their boats at ordinary wharfage rates?

A. I know there is a provision of that kind.

Q. You have something there to keep them off?
A. Yes.
Q. Don't you realize that makes a difference in its value?
A. What has that got to do with it?
Q. Did you figure any such thing?
125 A. I figured they could put a shedded pier; Kenyon's have shedded piers; Bush, they are all shedded.
Q. There was no proof that the Langleys were going to get permits?
A. There is no proof to the contrary.
Q. And on that sort of undecided thing you base this expert opinion of yours?
Answer. It is not anything undecided, no question in my mind, and I haven't any, but the city of New York would allow the Langley people to put a shedded pier on their property.
Q. How many times did you value the Langley property?
A. Three times, I think.
Q. When was the first time?
A. Condemnation proceedings of 1910 and 1911, it ran two or three years.
Q. What year?
A. I think it commenced 1910–11.
Q. As of what date?
A. You have my testimony there. My figure was $1.65 a square foot. The award was made in 1912.
Q. You do not know as of what date you fixed that value?
A. Along in 1911–12.
Q. Didn't you think, Mr. Graham, when you came here to-day to testify as to the value of the Langley property as of 1908 that the value you put on it in a proceeding a few years later that it was a——
(The rest of this question and answer is missing from the stenographer's minutes.)
Q. You tell me now you don't know?
A. I do not carry the exact date in my mind. I can refresh it.
Q. When?
A. Nineteen twelve.
Q. As of what date?
A. March, 1912.
Q. When was the next time?
A. Nineteen eighteen.
126 Q. For the Army board of appraisers?
A. Yes.
Q. Then this time, is that what you call the third appraisal you have made? You said in testifying three times.
A. I said this is the third time.
Q. There were only two others?
A. Yes.
Q. All the time for the Langley Estate?
A. All the time for the Langley Estate.

Q. When did you think or do you think that the value of water-front property in South Brooklyn was arrested at any time between 1900 and 1918?

A. I do not think there was any arrest in it at any time.

Q. You think it has kept right on increasing in value?

A. Yes.

Q. And that increase in value has continued from 1918 up until to-day?

A. Do you mean it is worth more than in 1918? Yes, sir.

Q. And at all times between 1900 and 1918 this property kept increasing?

A. There never was a time since 1900 when the water front on New York Harbor—and that is the only harbor you can take, the New York Harbor, in its development—there has never been a time since 1900 that the demand has not increased, except with small setbacks, where the values have not been increased.

Q. How long before 1915 did you represent the Bergen people in this property that you sold for them?

A. I do not know that I represented them particularly until the sale was made.

Q. When did they give it to you for sale?

A. I do not remember.

Q. How much did they fix as the selling price for it at the time you originally received it?

A. I do not remember. I remember the result of the negotiations—what was paid.

127 Q. You do remember the selling price?

A. Certainly.

Q. You do not remember how long you had that for sale or how much the price had fluctuated between the date you originally got it for sale until the date when the sale was finally consummated. Is that so?

A. I do not remember.

Q. Do you know whether the price went up or down at all?

A. I think they asked more money.

Mr. RIGGS. Price of what?

Mr. BUCHNER. Bergen property.

By Mr. RIGGS:

Q. Do you know what the consideration was for the Bergen property?

Mr. BUCHNER. I have not asked you.

A. It was a matter of negotiation. They wanted to sell. They were in a bad pocket and only two purchasers, one Kings County Lighting Company and the other the E. W. Bliss Company. They would probably hold it yet if neither one had bought it.

Q. In 1918, Mr. Graham, had the Connecting Railway connected up so as to run down to this Langley property?

A. There were rails down there.

Q. Was the Connecting Railroad operating down there?

A. Yes.

Q. Now, you take that as part of the reason for the value of this property, don't you; the fact that the Connecting Railroad is going to send your freight all over the country?

A. That was a potential value; yes.

Q. Was the Connecting Railroad down there?

128 A. The Connecting Railroad was in front of this property.

Q. How far away was it?

A. Sixty-second or Sixty-third—Sixty-fifth Street, two blocks away.

Q. About two blocks away from the west end of it?

A. Yes.

Q. Considerably more than two blocks from that small strip, wasn't it?

A. About five; but it had a Bush connection there.

Q. How did that property that you sold for the Bergens compare with the Langley property?

A. No comparison.

Q. As to size?

A. It was smaller as to size.

Q. How much smaller?

A. About six hundred feet smaller.

Q. That was land under water?

A. That was land under water. But you could not possibly build a pier on it over six hundred feet long.

Q. Why?

A. Because there was a charter provision not allowing a pier within one hundred feet of each other and that would be seventy feet wide. You could not build a pier down there less than seventy feet wide or within one hundred feet of each other.

Q. You said something about there being no piers south of Sixty-ninth Street. Is that right?

A. I said there was a city pier down there.

Q. There are four of them down there?

A. Not that I know of.

Q. How many do you know of?

A. One.

Q. Where?

A. Sixty-ninth Street.

Q. There is nothing below the Langley Estate in the line of city piers except this one?

A. City piers?

Q. Yes?

A. Not that I know of. There are small insignificant piers.

129 Q. What do you call a small and insignificant pier?

A. A pier that is two or three hundred feet long, fifty or sixty feet wide.

Q. Don't amount to anything?

A. No.
Q. Well, then, this kind of water-front property is not at all valuable, is it?
A. What kind?
Q. All this water-front property along here is not valuable unless until you get a pier fourteen hundred feet?
A. Not for pier purposes.
Q. For anything?
A. Manufacturing.
Q. No more value for manufacturing purposes on water front than some other place?
A. There are certain kinds of heavy material that wants to be brought by water.
Q. You can not bring them unless you have piers?
A. Yes, you can, swing them up against the bulkhead.
Q. Now won't you have to dredge out for the bulkheads to bring in any of that heavy material that you are talking about?
A. It just depends on how much water your lighter draws.
Q. You are going to lighter it?
A. Most manufacturers do lighter.
Q. Doesn't that add anything to the cost of it?
A. No.
Q. They would need a fourteen hundred-foot pier to tie up a ship if they bring lighters up?
A. They lighter stuff going to railroads, not particularly loading into ships.
Q. They lighter stuff going to boats, too?
A. From Manhattan and all around.
Q. Do you ever see them lightering stuff at South Brooklyn for the European trade?
A. Yes. Because they could load it on the offside of a ship.
Q. You said that you did not need a big pier to add value for manufacturing purposes on water front because you could put the lighter up against the bulkhead and unload it, and I ask you if that would make any difference in the case of material delivered and you said no, just as convenient.
A. No, I did not say it was just as convenient.

Redirect examination by Mr. RIGGS:

Q. Mr. Graham, will you describe for the benefit of the court how lighters are used in New York Harbor?
A. Lighters are used for assembling a cargo.
Q. A ship comes in and ties up at the pier, does it not?
A. Yes.
Q. And in order to discharge its cargo discharges some of it upon the pier and some of it over the side to the lighter?
A. Yes.
The COURT. Is he going to testify or you?
Q. After they get the freight in those lighters what becomes of it?

A. They are taken off to the different railroad yards and go to their destination.

Q. A pier fourteen hundred feet long will accommodate how many steamers on one side?

A. About two, sometimes three.

Q. Two or three?

A. Practically two.

Q. Isn't it a fact that most of the tonnage of the port of New York comes in and out of the port in steamers averaging from three to three hundred and fifty feet?

Mr. BUCHNER. Objected to. I do not think Mr. Graham is qualified here as a port expert. I do not think that he can answer a question like that.

131 Q. In valuing this property, Mr. Graham, do you value this property upon the assumption that the Langley Estate could improve the property with three piers and with warehouses, and that those piers, when built, would be shedded piers?

A. Yes.

Q. Now, on this Bergen sale, Mr. Graham, you said that property was in a pocket and that there were only two possible purchasers, Bliss on one side and the Kings County Gas and Lighting Company on the other. Will you please point out to the court where that property is and why you made that statement?

A. (Indicating on map.) This is the Bergen property, Fifty-third and Fifty-fourth Streets was open to high-water line on each side. This is as the property was when it was purchased.

Q. What was the improvement of the property to the north?

A. Filled in to this line [indicating].

Q. Filled in to bulkhead line of 1857?

A. Yes.

Q. What was the character of the fill to the south?

A. That was filled in the same way.

Q. So that the property to both the north and south was filled in to the present bulkhead line, which was the pierhead line of 1857?

A. Yes.

Q. And how wide was the property on the bulkhead line?

A. Two hundred and sixty feet.

Q. Two hundred and sixty feet?

A. Two hundred and sixty feet from the high-water line, to the pier line of 1857 from the end of the street.

Q. What, in your opinion, was the best use to which the Bergen property could be put at the time of its sale?

A. Just what the purchaser did, fill it in and build a factory.

132 Mr. RIGGS. I offer in evidence chapter 763 of the Laws of 1857 fixing this bulkhead and pierhead line.

(Document received in evidence and marked "Plaintiff's Exhibit N.")

Mr. RIGGS. I offer in evidence certified copy of a grant from the People of the City of New York to Leffert L. Bergen, R. L. Bergen,

and C. W. Wyckoff, dated May 20th, 1869, recorded in the register's office, Kings County, in Liber 920 of Conveyances, page 508.

(Document received in evidence and marked "Plaintiff's Exhibit O.")

Mr. RIGGS. I offer in evidence a certified copy of a map, No. 23, of the land under water in Kings County, from the office of the State engineer and surveyor, dated May 5th, 1920, showing the extent of the Bergen grant as therein appears.

(Document received in evidence and marked "Plaintiff's Exhibit P.")

By Mr. RIGGS:

Q. Mr. Graham, you spoke of passenger service at South Brooklyn in your cross-examination. What lines, if any, do you know use South Brooklyn for passenger service?

A. The Faber Line had a pier, runs to Naples and Italy. The American Hawaiian Steamship Company occupied the Bush piers, and others.

Q. Was South Brooklyn used for passenger service?

A. Passenger and freight service.

Q. How long has South Brooklyn been used for passenger service?

A. Ten years, I should say—something like that.

133 Q. Mr. Graham, upon your cross-examination there was reference made to the fact that the United States Government made the demand for piers so great in April, 1918. Do you recall the district attorney questioning you in that regard?

A. Yes.

Q. Since April, 1918, what piers which were used by the United States Government during the war have been restored to private ownership?

A. All of the Bush piers and most of the city piers.

Q. What, Mr. Graham, is the situation with regard to demand for piers at the present time?

Mr. BUCHNER. Objected to as incompetent, irrelevant, and immaterial; no proper foundation.

The COURT. Objection sustained.

Mr. RIGGS. Exception.

Q. Now, Mr. Graham, were there any other sales of property on the South Brooklyn shore about which Mr. Buchner did not ask you, which you took into consideration in fixing your value?

A. That was the only real sale of property of that kind, the Bergen sale. In 1904 I was interested with a broker in the sale of what was known as the Kent property to the Realty Company of America and which was finally combined to another Kent piece and sold to the Lotus Realty Company and finally sold to the city of New York (Twenty-seventh to Thirty-sixth and from Forty-ninth to Sixty-first Streets) in 1908. They paid $1.10 per square foot.

Q. Who paid $1.10?

A. The city of New York paid $1.10 in 1908.

Q. What did it purchase?

A. It purchased all the property from Twenty-seventh to
134 Thirty-sixth, from Second Avenue to the pierhead line, and the property from the center line of Fifty-ninth to the point within 115 feet 6 inches of center line of Sixty-first Street, 422 feet wide in all.

Q. What city department or board, if you know, fixed that price of $1.10 in 1908?

A. The Board of Estimate and Sinking Fund Commission, the dock commissioner, the comptroller, and port committee.

Q. Do you know whether that sale was effected after a public hearing?

A. It had a public hearing. I looked over all the documents in the case.

Q. Have you got all the documents and reports?

A. Yes; I looked them over and have a memorandum.

Q. That was in 1908?

A. That was in 1908.

Q. The city purchased at that time a similar property which intervenes between the two pieces of the Langley property?

A. Yes; now known as the city property.

Q. Are there any leases of property along that shore that you have taken into consideration in any way as affecting value?

A. Yes; along about 1918 the Shewan Shipbuilding Company, between Twenty-sixth and Twenty-seventh Streets, twenty-one years.

Q. About 1918?

A. About 1918.

Q. Where else was there a lease that entered into your calculations?

A. The city of New York leased at the same time to the Shewans part of the property adjoining for a period of ten years and renewals.

Q. Now, this sale that you have spoken of by the Lotus Realty Company to the city of New York. How did the Lotus Realty Company acquire title to that tract?

135 A. They bought two pieces, one from the Realty Company of America, and the other they had, 111 feet, 422, and the rest remained in the original Kent property and they combined the two properties and purchased them along about 1907.

Q. In your opinion, did the two combined properties have greater value than both of the properties separately?

A. Unquestionably.

Q. Was one of the properties acquired by the Lotus Realty Company of such a width that it could be used, in your opinion?

A. The 185 feet would be practically useless unless combined, and when they combined them they had 422 feet which made a usable piece of property and of course increased it in value.

(Adjourned to Tuesday, May 11, 1920, at 10.15 a. m.)

TUESDAY, MAY 11, 1920—10.15 a. m.

TRIAL RESUMED.

Mr. GRAHAM recalled.

Redirect by Mr. RIGGS:

Q. Mr. Graham, yesterday in your cross-examination you spoke of a sale of the Bergen estate to E. W. Bliss Company, and I put in evidence the grant to the People of the City of New York to the Bergen Estate, certain maps and other data.

Mr. RIGGS. I desire to offer in evidence certified copy of a deed made by Sarah Bergen, Edith Merdes, and Catherine M.
136 Whyckoff, parties of the first part, and E. W. Bliss Company, party of the second part, dated June 22, 1915, of the property in question, and recorded in the office of the register of Kings County, in Liber 343 of Conveyances, page 434.

(Document received and marked "Exhibit Q.")

Q. Will you look at this Exhibit Q, Mr. Graham, and state what the consideration named in that deed is?

A. One thousand dollars and other good and valuable consideration.

Q. What was the actual consideration paid for the property?

A. It was not——

Q. What was the actual consideration paid by the Bliss Company to the Bergen Estate for the property?

A. Three hundred and twelve thousand five hundred dollars.

Q. How much a square foot is that for the property?

A. Approximately $1.10 a square foot.

Q. Can you compare the property of the Bergen Estate sold in 1915 with the property of the Langley Estate?

A. I can not.

Q. Which, in your opinion, was the greater in value and how did they compare upon the question of value?

A. I consider the Bergen property worth about fifty per cent as much per square foot as the Langley property.

Q. Which of the two properties can be made more adaptable for use?

The COURT: I would be very glad to have Mr. Graham go into particulars in describing what in his opinion justifies fixing $2 a square foot for the Langley property in view of the $1.10 having been the selling price.

137 Q. Now, Mr. Graham, will you go into the particulars and state why in your opinion the properties are adapted for different uses?

A. The Bergen property had a width of 200 feet on First Avenue for a distance of approximately 400 feet west of First Avenue, Fifty-first, Fifty-third and Fifty-fourth being opened streets; beyond the high water line the streets were not opened and the property had a width of 260 feet. The property had a very large fill solidly out to the extreme easterly line of the Bergen property.

Q. That is along the boundary line of the next adjoining owner?

A. Along the boundary line of what would be the center of Fifty-third Street, if prolonged.

By the COURT:

Q. Is that south or north of Bergen?

A. North. What would be the center line of Fifty-third Street if prolonged to pierhead line of 1857. The same condition exists on the southerly side, which left that tied in between these two properties. The property was not available for pier purposes because no pier could be built within one hundred feet of another pier. These practically were filled in piers. We called them that because almost all of the Bush piers are built out and then filled in.

Q. What was you understanding as to the width of a pier required to be built on that property by law?

A. It could not be built any larger than 70 feet. It would have to be 100 feet from piers on either side. The use was restricted. The only thing that could be done was fill in, and that was what E. W. Bliss did after they purchased it, filled it in to this line [indicating].

138 Q. What in your judgment was the Bergen property best adapted for so far as improving it was concerned?

A. What the E. W. Bliss did, fill it in and use it for factory purposes.

By Mr. RIGGS:

Q. Was the Bergen property, in your judgment, a pier property?

A. It was not in my opinion. Not in any way in comparison with the Langley property. Now the Langley property, the property to the north of it was improved by a pier built for the Kenyons and occupied by the Kerr Steamship Company, and they had a slip on their own property of over 107 feet. As far as that restriction, the Langley could have built a pier right along the northerly line of their property, that left 107 feet over, and that property could be filled in. It could be used either as filled property or pier property, which would be the better use and more valuable use.

Q. The Langley property extended to the pierhead line of 1884?

A. Yes. More than 600 feet further out than the property lines of the Bergen property.

Q. Are there any other details of difference in use or value, Mr. Graham, that you would like to state in regard to the two properties?

A. There were practically no buyers for that property except the owners on the north and south. The amount of upland between the pierhead line of 1857 was very large in comparison with the amount of waterfront, and in my opinion there were only two buyers, the Kings County Lighting Company, and E. W. Bliss Company, and I tried to sell it to either one, and finally induced the E. W. Bliss to buy it.

139 Q. In other words, the value of property being governed by demand and supply, what would you say as to the difference in the degree of demand for the Bergen property and the degree of demand for the Langley property?

A. A much larger demand for the Langley property for the reason the Langley property was susceptible of being improved by very long piers, and there are many places in the harbor where you can get five hundred feet, and comparatively few places where you could get piers of one thousand feet and over.

Mr. RIGGS. I offer in evidence an extract from the minutes of the proceedings of the commissioners of Sinking Fund of the City of New York at the meeting held Monday, August 5, 1907.

The COURT. This document was offered in evidence and after objection by the Government, the objection was overruled, and the offer is received for a limited purpose only, namely, to prove that the proceedings involved a willing purchaser and willing seller.

(Document received in evidence and marked "Plaintiff's Exhibit R.")

Recross-examination by Mr. BUCHNER:

Q. You picked certain things that you said fixed the measure of value of water-front property yesterday, Mr. Graham. Will you tell me again what those elements are that you used to make up this measure of value?

A. Potentiality of the property suseptibility of improvement by long piers, with warehouses and rail connections, the acces-
140 sibility and the close proximity to deep water channel.

Q. That is four different elements?

A. They were probably the most prominent.

Q. I mean you divided them into about four classes?

A. About four classes.

Q. Are they all equally valuable in determining this value or is one more important than another?

A. I think they all are practically equal value, they all enter into it.

Q. Now take the Bergen property that you speak about, and taking the Langley property, starting from the back and coming up, accessibility and close proximity to deep-water channel, is there any difference between the Langley and Bergen?

A. No; practically no.

Q. They are practically the same?

A. Yes.

Q. Now, taking the other item, warehouse and railroad connection, is there any difference there between the Bergen and Langley?

A. Yes; for warehouse and connections there is a great difference there.

Q. I do not think I have got what you said correctly or you have not got what I said.

A. I understood that your elements in the measure of value was warehouse and railroad connection?

A. In connection with long piers.
Q. Oh, in connection with long piers?
A. Yes.

By the COURT:

Q. I would like to know whether you consider proximity to a great shipping center an additional element of value in warehouse and pier property, such as you describe the Langley property to be?
A. That is embodied in my——
Q. In the word "proximity"?
A. Yes.

141 Q. In other words, a tract which is within two or three or four miles of such a shipping center and great city, as represented by the Borough of Manhattan, would be more valuable than if it were fifty miles or one hundred miles away?
A. Yes.

By Mr. BUCHNER:

Q. Now you say that this warehouse and railroad connection that you talk of is in connection with long piers?
A. Yes, sir.
Q. It hasn't anything to do with the accessibility of a particular piece of property to existing warehouses or existing railroads at all?
A. Not generally, no.
Q. You do not think that enters into the measure of value?
A. Not in the measure of use there, not to any great extent.
Q. Does it enter into the measure of value that you generally use in figuring value of waterfront property?
A. It is an item.
Q. Do you think the measure of value which you use is something particularly individual to yourself, or is the general custom among men who are accustomed to value waterfront property.
A. I do not think I am the only man that has sufficient knowledge to value waterfront property.
Q. I did not ask you that?
A. That is the only conclusion I can reach from your question.
Q. I asked you if you thought that this theory of value that you testified here, is that something that is used only by you, or is that the general measure of value used by men who are competent to judge waterfront property?
A. Used generally by men who are competent to value waterfront property.
Q. You think that is the general experience of experts in waterfront property?
A. Yes.

142 Q. And you think that in the average valuation that they do not take into consideration the accessibility to an existing warehouse center or existing railroad; is that so?
A. I did not say so.
Q. Didn't you say you did not in this case?

A. No, I did not. You misunderstood me or I misunderstood your question.

Q. I thought I asked you if the only relevancy of warehouse and railroad facilities that you talked of was their relevancy to these long piers, or if you took into consideration the existing warehouse and connection with existing railways. I understand you to say no?

A. I did not intend to say no. They are all there and I know they are there. It is an element and I cannot get it out of my mind.

Q. And you figured that element in your consideration?

A. Surely.

Q. Now, as to that element, was the Langley property better, worse, or the same as the Bergen property?

A. It was practically as close to the Bush Terminal as the Langley, a little closer.

Q. It was closer?

A. Two blocks.

Q. That counts?

A. Not materially, four hundred feet or five hundred feet.

Q. Four hundred or five hundred feet does not make any difference?

A. No, I do not think four or five hundred feet would materially affect the value of real estate.

Q. You do not think so?

A. I do not think so.

Q. Do you think property on waterfront is worth more than property four hundred feet back?

A. What do you call waterfront?

Q. Whatever you call it.

A. I call waterfront from the pierhead line to the next in-
143 tervening street. I call the waterfront the property from the pierhead line to the westerly side of First Avenue.

Q. Anything outside of that is not water front?

A. Anything outside of that is not water front.

Q. You think that makes considerable difference in value?

A. On water-front property; yes.

Q. Now, if it was not water-front property, would it make any difference whether property fronted on First or Second Avenue as far as accessibility to these piers is concerned?

A. Please repeat.

Q. Would it make any difference whether the property was on First Avenue or Second Avenue, assuming that both are east of First Avenue as far as you are concerned in measuring value?

A. Do you mean property on the easterly side of First Avenue?

Q. Both o them are east of First Avenue, would it make any difference as to the measure of value, in your mind, if there was a plot one thousand square feet on east side of First Avenue or on the east side of Second Avenue, would there be any difference in value by reason of accessibility?

A. Not to the water front; no.

Q. You do not think so?

A. No, sir.

Q. You talked about potentiality as to piers. Now, is there much difference, really, Mr. Graham, between the potentiality of the property that you sold for the Bergen Estate than what there is for the Langley?

A. Yes, sir.

Q. Why?

A. Because it is not susceptible of the same improvement.

Q. Was the Langley property susceptible of more?

A. Yes.

144 Q. What you really mean, Mr. Graham, is because your description of the Bergen property stopped at the old bulkhead line instead of running out to the further pier line, that that difference in area makes the difference, isn't that so?

A. Not altogether; that is part of it; yes.

Q. How large a portion of the difference in value did you put to that?

A. I can not tell.

Q. Will you please pick out for me on this [Exhibit L] where that Bergen property is?

A. This is the Bergen property here [indicating].

Q. That is what you sold?

A. I sold from this point here [indicating].

Q. And the portion marked in yellow here is the portion of land under water?

A. It was under water when the Bergen property was sold.

Q. And the portion from this inside blue line to First Avenue was what you called upland?

A. Natural land.

By the COURT:

Q. It is the part between high-water mark and First Avenue?

A. Westerly side of First Avenue.

Q. Now, don't you really make your distinction in the measure of value between this portion of the Bergen property [indicating part under water] and the first, we will call it the smaller Langley piece, which is the northern portion of the property, the difference between the description in the Langley property which runs out to the pierhead line, and the fact that the Bergen property description only ran out to the bulkhead?

A. That is all that I had and that is all I considered.

Q. If the Bergen property had run out to the pier line wouldn't they have had enough property to build a fuorteen hundred foot pier?

A. They couldn't build one here.

145 Q. Why not?

A. Under the provision of law they could not have done it.

Q. Why?

A. Because they would not allow them to build a pier within one hundred feet of one another.

Q. Where on this map is there another pier that you call within one hundred feet of the Bergen property?

A. Here [indicating].

Q. That is eighty-one feet four inches?

A. That looks like thirty-one feet four inches to me. That is only one hundred feet altogether.

Q. It is probably thirty-one, but south of it where is the next pier?

A. There isn't any. They can build a pier of six hundred feet if they had a grant.

Q. They could build a pier?

A. If they had a grant.

Q. They could build a twelve hundred foot pier if they had not filled it in from the high-water line to the bulkhead.

A. If they built such a pier it would be entirely useless inside of that 1857 line.

Q. That is not what I asked you, Mr. Graham. If they had the grant over the water to the pierhead line there was nothing to prevent there being built on this Bergen property a fourteen hundred foot pier from the high-water mark?

A. If they complied with the provisions of that law.

Q. Now, you know how much the Langley people paid for their grant of water between the bulkhead line and the pierhead line, don't you?

A. No; I do not.

Q. Don't you know they paid twenty-five dollars an acre for that?

A. No; I do not.

Q. Didn't you testify to that before the Army board?

A. No; they may put that testimony in, but I never testified.

246 Q. In 1857?

A. I think that Colonel Dean asked me if I knew it as a fact; I looked it up and said that was the record.

Q. Can you tell us how many feet included from the bulkhead line to the pierhead line, prolonging the boundaries of the Bergen property?

A. Outside of 1857 line, practically 600 feet by 260 feet. That would be about 156,000 square feet.

Q. About how many acres do you figure that would be?

A. Forty-three thousand five hundred and sixty square feet to an acre, something less than four and one-half acres.

Q. So that if it cost them about $25 an acre it would cost about $100 for the land?

A. On the presumption that grant can be obtained from the State now at $25 an acre.

Q. Do you know how much the city of New York has gotten for any of those grants between the Langley grant in 1918?

A. I do not think they have gotten any additional grants there.

Q. Who could possibly have gotten a grant for that water?

A. The riparian owner.

Q. That is all?

A. Yes.

Q. And he is the only one?

A. Yes.

Q. You do not think it would have been as easy for the riparian owner to get a grant, as you took it for granted yesterday for an owner to get permission to build an enclosed pier?

A. I haven't the slightest doubt that the riparian board would grant the upland owner on proper compensation. I have never said so and I do not believe so.

Q. You merely think now?

A. I have always thought so.

147 Q. Then that takes away the larger portion of the element of difference between the Bergen and the Langley property?

A. No; it does not, in my opinion.

Q. This was in 1915 you sold?

A. I think it was in May or June, 1915, it was closed.

Q. How much had waterfront property down in South Brooklyn improved in value between 1915 and 1918—percentage of increase?

A. I testified in the condemnation proceedings for part of this Langley property, and the commissioners made the award at that time of $1.44 a square foot.

Mr. BUCHNER. I move to strike out.

The COURT. Motion granted.

A. I should say anywhere from 40 to 50 per cent.

Q. And between 1908 and 1915 how large was the measure of increase?

A. From 1908 to 1915 almost the same price.

Q. I do not quite understand that answer; what do you mean also the same price?

A. Forty to fifty per cent.

Q. Forty to fifty per cent increase?

A. Yes.

Q. And between 1895 and 1908 how much do you figure was the measure of increase?

A. Well, in 1895 that property was undeveloped, practically farm land, country residence.

Q. Let me have an answer, if you please, and then you can bring out explanations you want later.

A. Three or four hundred per cent. Now you carry me away back a long way.

Q. I do not want to carry you any further than you have already gone, and if I have done that I am going to correct it. Now, as I understood, Mr. Riggs asked you yesterday how much, what

148 percentage of increased value of South Brooklyn waterfront property showed from 1895 to 1908, and then he asked how much was the measure of increase between 1908 and 1918?

Mr. RIGGS. What I asked him was to give a history of waterfront as to what had taken place between 1895 and 1908 and what had taken place between 1908 and 1918, and I did not ask anything about ratio of increase.

Q. Didn't you yesterday afternoon, in answer to Mr. Riggs, maybe I have misstated, don't you remember saying that between 1908 and 1918 that the value had been very large, increased from one-quarter to one-third?

A. I do not remember any such question or any such answer.

Q. Didn't you make some such statement as to increase in value?

A. I do not think so. I do not remember the question, and I do not remember the answer.

Q. You do not remember saying yesterday at all about the percentage in increased values there?

A. I do not think I was asked any such question as that.

Q. When you tell me that values have increased from one year to another a certain percentage, do you figure, for instance, from 1895 to 1908, when you tell me they have increased 300 to 400 per cent you mean that the values in 1908 were four or five times as much as in 1895, is that right?

A. Yes.

Q. And then the increase from 1908 to 1915, which you said is from 40 to 50, that is 40 to 50 per cent of the value in 1908?

A. Yes.

Q. And from 1915 up to 1918 that gross value which you have put on it in 1915 increased 40 to 50 per cent?

149 A. My increase at that time—there was an increase, or the difference between 1912, $1.65, and what I said in 1918—that you can figure about 25 per cent, I should say 25 or 30 per cent. It is very difficult to carry your mind along in using percentages for periods like that.

Q. You testified in the Fifty-seventh to Sixty-first Street dock proceeding?

A. That is what I said, yes, sir.

Q. Do you remember in that proceeding being asked this question and making this answer: "What, in your opinion, is the percentage of increase per annum in property on the South Brooklyn water front available for freight or pier terminal?—A. Approximately 12½ per cent."

A. Is that my testimony? I do not remember what I testified in 1912.

Q. I want to know if you remember saying that?

A. I testified in that proceeding, the testimony is there and that is the official record I will admit it.

Q. Have you changed your opinion since 1912?

A. I have given you a broad view. I did not get down to my opinion to you on any annual percentage of increase.

Q. That is not an answer. Have you changed your opinion as to the measure of increase since 1917?

A. I have not changed my opinion that the property has increased.
Q. Have you changed your opinion as to the measure of increase?
A. I am talking approximately, I probably have not, no.

By the COURT:

Q. In your judgment the annual increase in value was 12½ per cent, or thereabouts, in water-front property in 1912. Has the same ratio of increase continued since then, or has it been more
150 or less?

A. Approximately the same, but as you reach the maximum value, I mean the percentage grows less, the property will increase to a point where in my opinion you could not capitalize it. I figure local conditions do not govern entirely.

Q. The nearest physical piece of property to the rest of the Langley Estate that bears any resemblance to it physically, is the Morse Dry Dock Company, is about right?

A. What do you mean by physical?

Q. I mean in area, for instance, and in possibility, isn't that about right, Mr. Graham?

A. The Morse Dry Dock and Repair Company is a developed property for special purposes, developed as a dry dock and repair yard, improved by basin in which a dry dock is located, and long narrow piers that you run a ship up against alongside and repair ships that are not required to take out of the water. It is a developed property, while the Langley property has never been developed or had not in 1918.

Q. Does that make the Langley property worth more than the Morse?

A. As far as location is concerned there is very little difference, there is no difference between the Langley property and the Morse, but the Morse is up against this situation, that it is filled. At its northerly boundary is the Kings County Lighting Company, and you have that a filled proposition right out to the bulk-head line which is the pierhead line of 1857. Now, to develop the Morse property in the same way as the Langley property could be developed you would be up against that situation.

Mr. BUCHNER. I move to strike out on the ground it is not responsive.

The COURT. Strike out.

151 Q. Will you answer my question, Mr. Graham, if you please?

A. I have answered it.

Q. In your opinion does the fact that the Langley property is unimproved and the Morse property is improved with certain improvements which are now on there, does that make the Langley property, which is unimproved, higher than the Morse?

A. I can not answer that either yes or no.

Q. What is your opinion as to it?

A. I would have to explain my answer.

Q. I will change it. Which, in your opinion, has the higher land value, the Langley property unimproved or the Morse improved?

A. If the Morse property was not improved it would have exactly the same potentiality as the Langley property and would have the same value. I am not prepared now to say that the improvements put on it has either increased or decreased its value as far as location is concerned.

Q. You do not know whether the improvements have increased or decreased the locational value of that property?

A. I could not answer that yes or no.

Q. If the Langley property should be in a position where its potentialities were only the same as the Morse would you say that its value was more or less than the Morse?

A. I said the locational value was practically the same, the same potentialities, they have the same potentialities.

Q. You testified in the Morse Dry Dock certiorari, didn't you?

A. I did.

Q. How often?

A. Once, I think.

Q. What year?

A. I do not remember.

Q. What years did you fix the value for?

A. I do not remember. I would have to refer to my records.

152 Q. Do you remember what value you put on?

A. I would not attempt to put a value on it until I looked at my records.

Q. You do not recall that?

A. I have the records. I think I could get them.

Q. Didn't you refresh your memory as to those values in determining the value of the Langley property?

A. Not just now, no.

Q. When did you?

A. I may have looked at them when I testified before the War Board. I think I did look at them.

Q. You did not think in giving an expert opinion as to the value of the Langley property that you ought to refresh your recollection as to your opinion of value in the Morse Dry Dock, which is so close to it and which you just say unimproved had possibly the same potentialities?

A. No, I think it is some use. It was in 1910 or 1911, something like that, I testified.

Q. W'sn't it '11, '12, and '13?

A. I would not say so.

Q. It might have been?

A. It might.

Q. And that you do not think would be a material factor in fixing the value of a practically contiguous piece of property?

A. I did not say so.

Q. Don't you think it would?

A. It probably would.

Q. And yet you did not refresh——

A. I did not put fifty cents a square foot on it and I know I did not put $1.10 a square foot.

Q. How much, do you know?

A. I would not want to say. You probably have my testimony. I think Colonel Dean cross-examined me on that. You have the record there, let me see it.

Q. Do you know how closely the values you gave were followed in the decision?

A. I have not the slightest interest to follow.

153 Q. You did not care?

A. I did not care.

Q. Did you bring those ships?

A. I looked, but I have not been able to find it. I have a record of steamship companies that wanted piers. I do not think I kept names of ships. They call up for a berth. The names are immaterial. I can give you names of steamship companies that were in the market for piers at that time, if you want it.

Redirect examination by Mr. RIGGS:

Q. Reference has been made here, Mr. Graham, that are really legal questions of law. Is it your understanding that under the laws of this State that lands under water can be ceded by the State only to riparian owner?

A. Yes, sir.

Q. What is your understanding as to the policy of the Commissioner of the Land Office in appraising property for purpose of grant at the present time.

Mr. BUCHNER. I object to anything as vague as that.

The COURT. Sustained.

Mr. RIGGS. I will withdraw the question.

Q. Do you know of an application made by W. R. Grace & Company to Commissioner of Land Office for a grant of land under water.

Mr. BUCHNER. I object unless the date of it is fixed.

Q. About the year 1913 or '14?

Mr. BUCHNER. Objected to. That is entirely too far away to be material.

The COURT. Overruled.

Mr. BUCHNER. Exception.

154 A. I know that Mr. Williams of Grace & Company applied to the Land Office for grant under water at foot of Conover Street.

Q. Do you know what price the State of New York fixed upon the land between pierhead and bulkhead line?

Mr. BUCHNER. Objected to.

The COURT. Overruled.

A. I only know from general talk.

Q. You do not know of your own knowledge?
A. I did not make the application and I was not interested in the proceeding.
Q. You mean general talk with real estate brokers?
A. That is right.
Q. Will you give us that?
Mr. BUCHNER. Objected to.
The COURT. Sustained.
Mr. RIGGS. Exception.

DAVID PORTER, a witness called on behalf of the plaintiff, having been duly sworn, testifies as follows:

Direct examination by Mr. RIGGS:

Q. What is your address?
A. 175 Eighth Avenue; business, 32 Court Street.
Q. What is your business?
A. Real estate.
Q. How long have you been engaged in the real estate business?
A. Over twenty-six years.
Q. During that time what borough of the city have you been engaged in?
A. This borough, right here.
Q. As principal and as agent?
A. Both.
155 Q. And have you made appraisals of property throughout the Borough of Brooklyn and elsewhere during that time?
A. I have; yes, sir.
Q. Have you made appraisals of waterfront property?
A. I have.
Q. Have you made a special study of conditions surrounding waterfront property?
A. I have made a study of it, yes.
Q. Do you keep track of sales of property within the Borough of Brooklyn?
A. Yes, sir.
Q. What means do you take to keep track of such sales?
A. I have in my office a car index system showing approximately 100,000 records of sales of all classes and kinds of property in the Borough of Brooklyn, kept up to date all the time, posted in every day of the week.
Q. During the time that you speak of have you acted as appraiser for any institution in the City of Brooklyn?
A. Yes, sir.
Q. Will you name some?
A. The Equtable Life Insurance, the Equitable Trust Company, the United States Title and Guarantee Trust Company for the mortgages they guarantee, for the Guaranty and Trust Company,

for the State of New York, for the city of New York, and for the United States Government. I appraised this building one time.

Q. Have you acted as expert witness in various proceedings?

A. Yes, sir.

Q. Have you acted as expert witness for the City of New York?

A. Yes, sir.

Q. In what cases have you acted as expert witness for the City of New York?

A. One was the Thirty-ninth Street Ferry proceeding.

Q. In what year?

A. That was away back about 1910.

156 Q. Did you act as witness in the Manhattan Bridge approach?

A. Yes, sir; that is the Flatbush Avenue extension.

Q. Did you act as witness in the Joralemon Street case?

A. Yes, sir; both for the city and property owners.

Q. Have you made appraisals of waterfront properties in the Borough of Brooklyn?

A. Yes, sir.

Q. Now, what properties have you appraised, and for what institutions and in what years?

A. I have appraised the property of the New York Dock Company to Red Hook, about two and one-quarter miles; I appraised that three times, first 1912, then 1914 and 1916. I appraised the whole of Greenpoint and part of Williamsburg, the waterfront running from Newtown Creek to Grand Street, small pieces here and there.

Q. Did you appraise the property of the Kings County Gas Company?

A. Yes, sir.

Q. Where is that situated?

A. Fifty-fourth and Fifty-fifth Street, First Avenue, New York Bay.

Q. Have you ever appraised the property of the Morse Iron Works?

A. Yes, sir.

Q. What year?

A. 1907.

Q. Did you ever appraise the Robbins Dry Dock in Erie Basin?

A. Yes, sir; also the property of the Langley Estate.

Q. Did you testify as expert witness for the Langley Estate in the condemnation proceedings brought by the City of New York in 1912?

A. I did; yes, sir.

Q. How long have you been acquainted with the property of the Langley Estate, South Brooklyn?

A. Over twenty-five years.

157 Q. And how many different appraisals of it have you made?

A. This is the second.

Q. Have you examined the property with a view to testifying as to its value in this proceeding?

A. Yes, sir.

Q. Will you state what, in your opinion, the property is best adapted for?

A. Long piers and warehouses.

Mr. RIGGS. Any cross-examination as to qualification?

Mr. BUCHNER. No.

Q. How many appraisals of the Morse Dry Dock Company did you make?

A. Just one.

Q. How many of the Kings County Gas Company?

A. Several; four or five of them.

Q. What, in your opinion, Mr. Porter, are factors entering into the element of value of water-front property?

A. The way they can use it, the best use to which it can be put.

Q. What, in your opinion, was the best use to which the Langley property could have been put in April, 1918?

A. Long piers and warehouses, something like the Government has done there.

Q. That is, the construction of warehouses and manufacturing buildings on the upland with long piers extending to the pierhead line?

A. That is right.

Q. And what character of piers did you assume would be the best use?

A. Piers something like what are there, covered piers.

Q. Shedded piers?

A. Shedded piers, like the Bush piers, piers of that character.

Q. Do you adopt the description of the property as given by Mr. Graham upon the stand?

A. Yes, sir.

158 Q. What, in your opinion, was the market value of the property of the Langley Estate in South Brooklyn on April 6, 1918?

A. $3,428,644.

Q. Now assuming, Mr. Porter, that the title to Sixty-first, Sixty-second, and Sixty-third Streets, from the westerly side of First Avenue to the high-water mark, was in the city of New York on that date, what, in your opinion, was the market value of the property of the Langley Estate?

The COURT. You mean from First Avenue to the high-water mark.

A. $3,428,644.

Q. That is the same?

A. Exactly.

Cross-examination by Mr. BUCHNER:

Q. Do you use a unit of value?

A. Yes, in valuing the property as a whole, yes.

Q. What is your unit of value?

A. Two dollars per square foot.

Q. There is a little discrepancy between your figures and Mr. Graham's, then, at $2 a square foot?

A. I do not know what his figures are; I know what mine are.

The COURT. There is only twenty cents.

Q. How do you get the $2 per square foot unit?

A. It is a matter of judgment, considering all the things that have been made all around the harbor in Brooklyn, everything that has happened.

Q. I mean by that, do you figure first how much a square foot the property is worth and then multiply it by the area, or do you appraise the property as a whole and then divide the area into it?

A. No, you get your unit.

159 Q. You figure that is worth $2 per square foot?

A. Yes; absolutely, without a shadow of a doubt.

Q. Tell me, Mr. Porter, how you can say, if you take 81,120 square feet, the area in the bed in the street, from First Avenue to the high water mark, how you can still say at $2 a square foot that that property is worth $3,428,644?

A. In the first place you do not take it out, it is still there.

Q. You are not going to pay the Langley estate as a value of their property something they do not own?

A. The value of the street is reflected in the other property. Of course, you would have to use it that way anyhow. You would have to give up some property to street, if you call that street; or air, space or light, or anything you like.

Q. What I do not understand is this, Mr. Porter. May be you can explain it for me. If you fix $2 a square foot as your unit of value and if you take 81,120 square feet out of that——

A. I have already said you do not take 81,000, whatever it is, out; it is still there and you would have the use of it as if you owned it. It does not make a particle of difference. You can see that.

Q. I confess I can not. You told me flatly that you take $2 a square foot as the unit and multiply it by the area?

A. And the area including the streets.

Q. Now, Mr. Porter, let me ask you something; take this map, Exhibit L; if you were asked to appraise the property from the east side of First Avenue to the west side of Second Avenue from Fiftieth Street to Forty-eighth Street say, and you picked as your unit the value a certain amount per square foot, would you multiply that figure by the area in the bed of Forty-ninth Street?

A. No, I would fix the amount of square feet you put

160 upon it by the fact that there was a street in front of it.

Q. Then you do not fix $2 per square foot as the unit of value?

A. I do, sure I do; I certainly do.

Q. Will you tell me, then, what difference it makes to you in your calculations what the area of the Langley property is if you are not going to deduct area that is taken away from it?

A. The area is not taken away. It is not taken away. It is still there and you can use it exactly the same way as if you owned it down to China.

Q. Now let me ask you this. If instead of streets, if somebody else owned or if the city opened Sixty-first, Sixty-second and Sixty-third Streets and ran down in there, would you include the area in the bed of those streets in figuring up how much the value of the Langley property was?

A. Absolutely.

Q. You would?

A. Certainly, anybody with common sense would.

Q. Then you pay the Langleys for not only what they own but for what the city owns?

A. No; you do not. The amount of the value of the streets per square foot is reflected upon the other property by reason of the fact that the streets are there.

Q. That sounds all right, but as a mathematical proposition will you tell me how you get the same area when you multiply $2, which you say is your unit of value, by one set of figures and when you multiply $2 by the same set of figures less 81,120 square feet, as a mathematical proposition?

A. As a mathematical proposition that would not come out, but as a rule of common sense it would.

161 Q. You do not pay any attention to mathematics in your expert appraisal?

A. When you go against common sense.

Q. Then you confess that you had not allowed in your second appraisal $2 a square foot, don't you?

A. If you deduct the number of feet in the streets then you increase the unit.

Q. Then your theory of expert appraisal is that having fixed the value you must make your figures to suit?

A. Not at all.

Q. Isn't that what you did?

A. Absolutely not.

Q. How do you fix $2 a square foot?

A. It is a matter of judgment.

Q. Based on what?

A. Based on common sense and the sales and everything that has taken place around the harbor of Brooklyn here for many years.

Q. Now, are those the only things that you used in determining the value?

A. That is about all.

Q. Common sense?

A. I do not know.

Q. What are the other things?

A. Experience in handling property of all kinds.

Q. What else?

A. I do not know as there is anything else.

Q. Now, Mr. Porter, don't you know that the greatest portion of your professional judgment as to these values is based on your experience? How much of it, how much of the appraisal, do you base on your experience?

A. I could not give you percentage, it all came together.

Q. How much do you base from sales?

A. I can not tell you.

Q. When you appraise water-front property, what items do you figure are the measures of value?

A. I do not understand that question.

Q. You heard Mr. Graham testify?

A. Yes.

Q. He took about four or five different salient features upon
162 which he based his value of water-front property. Have you any features upon which you base it?

A. I might say because it is water front, its potentialities, the possibilities of it, what you can use it for, that is as to all property, it has only a value by reason of the fact that you can use it.

Q. You divided it into two things—the fact that it is water-front property and its possibility?

A. Yes, sir.

Q. What goes to make up its possibilities?

A. The fact that it is in New York Bay, the fact that it is susceptible of building long piers, which, in my judgment, is the best use to which it could be put, also for manufacturing buildings, by reason of the fact that the railroad facilities were there—it is pretty near the connecting railroad; the Bush Terminal railroad ran right behind it, which connected it with the railroad and the Fourth Avenue subway right behind it on Fourth Avenue.

Q. Let me ask you what you call right behind? How far is the Fourth Avenue subway?

A. Three blocks.

Q. How long are those blocks?

A. Seven hundred feet. That is not very far.

Q. Half a mile?

A. No; it isn't half a mile.

Q. What station is on there?

A. Thirty-sixth Street.

Q. How far is that?

A. There is a station at—I forget the stations on the subway. I think there is a station pretty near by there.

Q. Beg pardon.

A. I think there is a station pretty near by.

Q. You do not know how near?

A. It would not make much difference if it was a block either way.

163 Q. You do not think it would make much difference?

A. Not a particle to anybody of common sense.

Q. What particular value has the subway in its proximity to water-front property?

A. Bring people down there, of course. There is a good deal of land around there to build houses for the workers. It is a very important thing nowadays.

Q. How far back?

A. Of course, Greenwood Cemetery comes in, you cannot improve.

Q. How far back do you think the land suitable of improvement for workers' homes?

A. Four blocks.

Q. Four blocks?

A. Five or six.

Q. Give me the streets and blocks between which you think are suitable of improvement by workers' homes?

A. Between Second and Third Avenue.

Q. On what streets?

A. All these streets behind here.

Q. Now, Mr. Porter, you are testifying here as an expert, showing accuracy, can't you give me a little more detail than that?

A. Why, from Forty-second Street—no, the Bush comes in there. I should say from Forty-second Street that runs up to Fifth Avenue, from that away down, then you have all Bay Ridge beyond Sixty-fifth.

Q. Is all Bay Ridge beyond Sixty-fifth Street vacant property?

A. No; but there is plenty of land to build houses on it. I have some myself that I want to sell.

Q. Is it the kind of property they need to build workmen's houses on?

A. It is.

Q. Where?

A. On First Avenue and Bay Ridge Avenue.

Q. First and Bay Ridge?

A. Yes.

Q. That is right in back of the park?

A. There is no park there.

164 Q. Doesn't the city park property start there?

A. No; the city did lay that out as a park but they abandoned it.

Q. They have abandoned it?

Answer. They have abandoned Owles Head Park. It is on the city map as a park.

Q. Is there any reason, then, why that property cannot be put back into the commercial development class?

Mr. RIGGS. What?

Q. The property that you said the city laid out for a park?

A. No; it is private ownership. It never was a park, except they started condemnation.

Q. That bounded in the Langley property once?

A. That bounded on the Langley property once.

Q. When did you make these three appraisals for the New York Dock Company?

A. Nineteen twelve was the first, as I remember it; 1914 the second; and 1916 the third.

Q. Nineteen twelve?

A. Yes.

Q. Now what property of the New York Dock Company did you appraise?

A. The whole of the property that they owned between Brooklyn Bridge and Red Hook.

Q. How near to the property of the Langley did the southern part of this property come?

A. That would be half a mile.

Q. Half a mile?

A. Maybe a mile; I suppose it is a mile.

Q. Did you take into consideration your value of that property in appraising the Langley property?

A. Take into consideration?

Q. Did you take into consideration the appraisals you had
165 made of the New York Dock Company's property in appraising the Langley property?

A. The appraisals I made for the New York Dock Company fitted me better to appraise the Langley property than if I had not appraised it, the experience.

Q. Well, you think the appraisals you made of the New York Dock Company's property were correct, don't you?

A. Oh, yes; always do.

Q. Don't you think you have to base in some respect your judgment of the value of the Langley property on the dock company?

A. It is different property. The only resemblance is that it is water front.

Q. Is this Langley property unique?

A. Yes.

Q. Is there anything like it in New York Bay?

A. No; excepting the adjoining property.

Q. Whose property?

A. The city of New York property is the same in the center of it, and then the adjoining property until it was changed. At one time it was the same. My memory goes back to when it was all the same without any improvements on it all.

Q. Is there any other property outside of the Langley Estate property and city of New York property around New York Harbor that is the same as this?

A. (No answer.)

Q. Nothing like it?

A. Not exactly the same, somewhat similar but not exactly the same.

Q. Was it unique in 1918?

A. Yes.

Q. What property most closely resembles it?

A. The property adjoining it, if it had not been filled in.

Q. What particular difference is there between the Langley property and the city of New York property there and this property on Staten Island below Tompkinsville?

166 A. There is a difference. I do not know that property particularly. It is not worth as much as this, everybody knows that.

Q. Do you know anything about real estate water-front property in Staten Island?

A. I do not know much about Staten Island; I've only been there once in my life.

Q. Do you know anything about water-front property in Manhattan?

A. I'm not very well posted with Manhattan. I know it generally.

Q. Do you know anything about water-front property in New York Harbor on the Jersey coast?

A. I know of it, but I am not particularly interested in it.

Q. What particular portion of the Borough of Brooklyn and Queens do you know the water-front property in?

A. Jamaica Bay. I know a piece at Jamaica Bay water front.

Q. That is entirely different from this?

A. It is.

Q. No resemblance, is there?

A. Not much.

Q. What particular portion of the shore front in New York Bay do you particularly know?

A. All around the Borough of Brooklyn, practically.

Q. You do know all?

A. Practically.

Q. Is there any difference between water-front property in the eastern district of Brooklyn—for instance, upon it at the foot of Fulton and these streets around here [indicating on map] and water-front property over an South Brooklyn there [indicating on map]?

A. Sure.

Q. Much difference?

A. Oh, yes.

Mr. Riggs. I offer in evidence a map published by the United States Coast & Topography Survey, dated June, 1919, entitled

167 Hudson and East Rivers from West Sixty-seventh Street to Blackwell's Island.

Mr. Buchner. Objected to as immaterial.

Mr. Riggs. I will withdraw it.

Q. There really is not much space for judging value of South Brooklyn property in your knowledge of value on the eastern district of Brooklyn?

A. Except in so far as the knowledge of what is happening, what is being sold and what is being rented upon the harbor; that is all.

Q. Very general?

A. Why, yes.

Q. Is that also true of your knowledge of water-front property foot of Fulton Street and contiguous property there?

A. About the same; yes.

Q. Where do you think that South Brooklyn water-front property begins—what street?

A. South Brooklyn. Atlantic Avenue, that is what they call South Brooklyn.

Q. From Atlantic Avenue to where?

A. Sixty-fifth Street; some people call it Bay Ridge.

Q. In between Atlantic Avenue and Sixty-fifth Street, that is the district you take?

A. I do not take any.

Q. I want to get the area you took in South Brooklyn?

A. That is what is generally understood. Some people down there call it Bay Ridge and some people call it South Brooklyn.

Q. What do you call it?

A. I would say it was South Brooklyn or Bay Ridge.

Q. Would you say that South Brooklyn water-front property is the water-front property from Atlantic Avenue to Sixty-fifth Street?

A. I should say so.

Q. Now, in that area when was the first appraisal you made?

A. Nineteen seven.

Q. And for whom was that?

A. Morse Dry Dock.

168 Q. Where is that?

A. Between Fifty-fifth and Fifty-sixth Streets. [Witness examines record.] Well, it is in the center of the block between Fifty-fourth and Fifty-fifth and about the center of the block Fifty-sixth and Fifty-seventh.

Q. How far out did it run?

A. Eighteen hundred and thirty feet.

Q. Out to pierhead line?

A. Yes, sir.

Q. What sort of proceeding was that appraisal made?

A. It was not a proceeding at all; private appraisal.

Q. Just for Morse Dry Dock Company?

A. Yes; Col. Dyckman.

Q. Were you called as a witness on that appraisal?

A. No.

Q. What was the occasion of it, may I ask?

A. Reorganization.

Q. Did you make any other appraisals in that area in nineteen seven?

A. No.

Q. When was the next appraisal by you made? You will understand, Mr. Porter, so that I shall not have to repeat it, that when I ask when these appraisals are made, I mean appraisals of water-front property from Atlantic Avenue to Sixty-fifth Street. When was the next one that you made?

A. I appraised Robbins Dry Dock. What year that was I do not know, but I think it was some time around the same time.

Q. Robbins Dry Dock when?

A. I think it was nineteen seven.

Q. Where is that located?

A. Erie Basin.

Q. Is that in this area?

A. Yes.

Q. Are you quite sure about it?

A. Absolutely.

Q. That is a part of this South Brooklyn water front?

A. Sure.

Q. Give me that area; give me the property that you appraised.

A. The Robbins Dry Dock.

169 Q. It means nothing to me, Mr. Porter—the area of it.

A. You will have to get it on the map somewhere. It is ancient history.

Q. What streets?

A. Away down by Richards Street. It does not run over to Conover Street. It is the Erie Basin, The Erie Basin is a distinctive place by itself. Practically every Brooklynite knows Erie Basin.

Q. The Erie Basin is quite different from Brooklyn water front?

A. It is in the territory between Atlantic Avenue and Sixty-fifth Street.

Q. Let me have an answer to the first question: The Erie Basin is quite different from the South Brooklyn water front?

A. Yes; you would have to specify the South Brooklyn water front because you have designated Atlantic Avenue and Sixty-fifth Street as South Brooklyn.

Q. Did you testify in that appraisal?

A. No.

Q. What was that appraisal made for?

A. Just for the purpose of telling what it was.

Q. An appraisal just for a corporation?

A. That is right.

Q. When was the next appraisal that you made in that area?

A. I think the New York Dock Company.

Q. When?

A. 1912.

Q. Now, what part of the New York Dock Company—how much of it is in that area that you have spoken about?

A. About one and one-half miles, I should say.
Q. From what street?
A. From Atlantic Avenue to Erie Basin.
Q. From Atlantic Avenue to where?
A. To practically Erie Basin—Red Hood, we call it.
Q. Which is it?
A. I think perhaps the next one was——
Q. Wait a minute; you have not finished?
170 A. The one before that; perhaps the Thirty-ninth Street ferry proceedings.
Q. When was that?
A. December 4, 1908.
Q. What property did you appraise?
A. Property of the Thirty-ninth Street Ferry, occupied now by the Thirty-ninth Street Ferry.
Q. Give me the area.
A. There were a whole lot of appraisals here. Between Thirty-ninth and Fortieth Streets.
Q. The area? A. You want to give me time, I have a diagram of everyone here.
Q. I beg pardon. A. There were a great many pieces. There were different owners on one tract, perhaps half a dozen and more than that.
Q. This is the Thirty-ninth Street Ferry proceeding you are talking about now, is it?
A. Yes, sir.
Q. Give me the area of land that you appraised, that is what I want, I do not care how many owners it had.
A. It was about 250 by 1,000 feet, I should say.
Q. You have not got the area there?
A. If you want me to add them altogether, I will do so, but it will take some time.
Q. Did you add them together before you came in?
A. No.
Q. You did not use that appraisal as any part of the measure of this Langley Estate?
A. Not except that I got information there that was useful to me later, which was all useful to me later, when I go to make up an appraisal.
Q. Did your measure of value that you made on this property on the Thirty-ninth Street Ferry in any way enter into your calculation of the measure of value of the Langley Estate?
A. Yes; it was——
171 Q. Did it?
A. I can not say specifically, but it was part of the information that I had in my mind when I came to make up my mind what the Langley Estate property was worth.
Q. Very general?
A. Not very general at all; these things are all specific.

Q. Were they to you?
A. Oh, yes; they stick in your mind.
Q. Why don't you be specific in your answers to me?
Mr. Riggs. Objected to.
Q. And give me the area that I have asked you for?
A. If you want me to take the time, I will be very glad. Do you want me to?
Q. If you please.
A. There was one piece 429,567 square feet.
Q. May I ask where you are getting that from?
A. From a diagram that I used when I testified.
Q. Give me the figures.
A. Four hundred and twenty-nine thousand five hundred and sixy-seven square feet. That was between the property of the city of New York which was between Thirty-eighth Street and Thirty-ninth Street, that was taken from the Brooklyn Rapid Transit.
Q. It is Thirty-eighth and Thirty-ninth?
A. Yes. Four hundred and twenty-nine thousand five hundred and sixty-seven square feet at one dollar and ten cents.
Q. That what you appraised it at?
A. Yes, sir.
Q. For the city?
A. For the city in nineteen eight.
Q. There were improvements on that?
A. No.
Q. None at all?
A. No; we did not value the improvements.
172 Q. I did not ask that. I said there were improvements on it.
A. There were rails on it and nothing else.
Q. Was there a slip?
A. No.
Q. Some ferry boats operating there?
A. No.
Q. Wasn't anything at all?
A. Not at all. It is the other side of the ferry.
Q. It is in the area that you valued?
A. No; that is the first piece. Here is another piece, two hundred and sixty by four ninety-four.
Q. What is your calculation as to that?
A. One dollar fifty for part and one dollar fifty for another part.
Q. I want the area, Mr. Porter.
A. The area in square feet? One hundred twenty-eight thousand four hundred and forty square feet. Here is another piece twenty-four thousand four hundred and seventy-one square feet. Here is another piece one hundred and ninety-six thousand six hundred and twelve square feet. Still another piece thirty-eight thousand two hundred and sixty-nine square feet. Still another piece forty-four thousand two hundred and fifty-six square feet. Another piece

fifty-eight thousand three hundred and fourteen square feet. Another piece one hundred and sixty-three thousand nine hundred and fifty-six square feet. I think that took the whole of it.

Q. How much of that is located west of First Avenue, at the pier head line?

A. There is none at First Avenue there at all.

Q. How much of it is west of Second Avenue pier head line?

A. It is all west.

Q. You count this all water-front property?

A. Yes, sir.

Q. How much did you value this at that time?

A. Two dollars per square foot for part and one dollar and ten cents for another part of it.

173 Q. Do you know how much was actually paid for it?

A. By whom?

Q. By the city?

A. The city did not buy it at all. It was damaged. The city was taking part of it and you valued it before and you valued it after and the difference was damaged.

Q. Now let me ask you, didn't the city take some part?

A. The city took the one dollar and ten stuff.

Q. The one dollar and ten cent stuff?

A. Yes, sir.

Q. How much did they pay for it?

A. One dollar and ten cents, they paid a trifle more. For instance, they gave a little more. I will tell you what they gave. The damage was one hundred thousand nine hundred and ninety-seven dollars and they gave one hundred and ten thousand dollars.

Q. Your damages were one hundred thousand nine hundred ninety-seven dollars and the commissioners gave one hundred and ten thousand dollars and the railroad company claimed four hundred and fifty thousand dollars. There was consequential damage included in that estimate?

A. No.

Q. No?

A. No. There was a little.

Q. Part of the value of a franchise included in it, wasn't there?

A. No. Oh, no; the franchise did not run down there at all. They claimed that, but they were not allowed it. They claimed four hundred and fifty thousand dollars.

Q. Your figures of one hundred thousand nine hundred ninety-seven included some item of consequential damage?

A. Very little.

Q. How much, what kind of consequential damage?

174 A. By reducing the area of the property, that was all, not by any franchise or anything of that kind.

Q. Now when was the next appraisal that you made?

A. In 1912; I have given you that.

Q. You have spoken about it, but you did not tell me. Did you estify on that appraisal in that proceeding?
A. For the New York Dock Company?
Q. Yes.
A. Before the tax board?
Q. You testified before the tax board for the dock company?
A. For the dock company and they reduced the taxes five million ollars.

By the COURT:

Q. Reduced the taxes?
A. Reduced the assessment, your honor. I knew I said the wrong ord.

By Mr. BUCHNER:

Q. That included improvements?
A. That included improvements.
Q. Warehouses, docks, and all that sort of thing?
A. Yes, sir.
Q. All this property of the New York Dock Company is improved, n't it?
A. It is.
Q. They haven't any vacant, unimproved property?
A. No.
Q. How near to the Langley property does the New York Dock roperty run?
A. Well, it looks like a mile or half a mile.
Q. The same sort of property, is it, or was it before it was im-roved?
A. No, oh, no.
Q. What was the difference?
A. You could not build a pier fourteen hundred feet on the New ork Dock Company property.
Q. How big are their piers?
A. Three, four, five, six, seven hundred feet, except in the Erie Basin, in the Atlantic Basin, where by putting the piers not out into the bay but facing them parellel to the street they et one thousand feet.
Q. One thousand feet?
A. I think so.
Q. Don't you know?
A. It is 1916 since I have been there, I think that is about right; n atlas will tell you all about it.
Q. But you are supposed to be able to tell us.
A. I can not remember everything.
Q. You do not know how big the largest pier of the Dock Com-any is?
A. I think one thousand feet is the largest pier they have got.
Q. Do you think that this Langley property is more valuable than he New York Dock Company's property?

A. It is different.

Q. Entirely different?

A. There is some of the New York Dock Company's property I put more value on than I do on the Langley property.

Q. How much a foot did you allow in this proceeding for the land of the New York Dock Company?

A. Some of it two dollars and fifty cents, some of it two dollars and seventy-five cents.

Q. Now, where did you put this two-fifty value?

A. Down about Fulton Ferry, as I remember it.

Q. Fulton Ferry?

A. Yes.

Q. That is a great deal more accessible and closer to the heart of the city than the Langley property, isn't it?

A. It is not so accessible, it is closer to the heart of the city.

Q. Where did you put this two seventy-five?

A. I really do not remember. If you want, I have every appraisal I made and can give them to you.

Q. Let me ask you, when did you go down and look at this Langley property?

A. The last time?

Q. When did you go down to look at it preparatory to testifying here?

176 The COURT. The first time.

A. The first time was in 1886.

The COURT. Preparatory to testifying in this proceeding?

A. The first time, that was about six weeks or two months.

Q. Previous to that when had you been down?

A. Many times I passed it twice a day for twenty years.

Q. When did you go down to look at it?

A. In 1912, when we appeared in the other proceeding.

Q. You did not see it between 1912, 1916, and 1918?

A. I passed it twice a day; I lived in Bay Ridge twenty years.

Q. Did you pass along First Avenue?

A. I rode in the elevated and saw it from there.

Q. The elevated runs along Third Avenue?

A. No; Fifth Avenue, and you can look down and see it.

Q. It runs along Fifth Avenue out there?

A. Sure.

Q. Doesn't the elevated turn off between Thirty-sixth Street?

A. I beg your pardon; now you are right, it turns down at Thirty-sixth Street.

Q. Is your memory on other things the same as this last?

A. I am not passing upon my memory; somebody else will have to do that.

Q. Where do you live, down there?

A. I used to live in Bay Ridge.

Q. When?

A. Until about five years ago.

Q. Where do you live now?
A. Eighth Avenue.
Q. How long have you live there?
A. About three years.
Q. After you moved from Bay Ridge where did you go?
A. I went to my son's house.
177 Q. What part of the city?
A. Flatbush.
Q. I do not mean your personal affairs, I meant what part of the city?
A. I am living in Eighth Avenue now; previous to that in Flatbush; previous to that for nineteen years I lived in Bay Ridge.
Q. But between 1912 and six weeks ago the only time that you saw this property was the view you had of it while looking out at it from the elevated window?
A. No, I was down there examining the Kings County Lighting Company, and I had been there for twenty years.
Q. When did you examine the Kings County?
A. Less than a year ago.
Q. And previous to that when were you there?
A. I really did not take any account of it.
Q. Now, after this 1912 appraisal of the New York Dock Company, when did you make another appraisal down there?
A. Kings County Lighting Company was perhaps the next.
Q. When was that?
A. In 1917, I think that was.
Q. And what property of the Kings County Lighting Company did you appraise?
A. Between 54th and 55th Street, First Avenue and New York Bay.
Q. Was that for a proceeding in which you were to testify?
A. That is right.
Q. Did you testify?
A. I did.
Q. In what proceeding?
A. A rate case.
Q. Had you testified for them previous to that?
A. Yes.
Q. When?
A. About two months before that before Judge Hughes as a receiver.
Q. The same case?
A. Yes.
Q. And that was when they wanted to raise their rates for gas?
A. Yes.
178 Q. How much did you say that land was worth down at Kings County Gas Light Company a foot at that time?
A. Two dollars and sixty-four cents.

Q. And that testimony that you gave in this proceeding to raise rates?

A. To raise the rates.

Q. To the consumers of gas?

A. I gave that testimony to tell the court what the value of the property was and I did not care what they did with it.

Q. Were you sent out as an official of the court, or were you testifying for the Kings County Lighting Company?

A. I was employed by the Kings County Lighting Company.

Q. What was the name of the proceeding?

A. I really do not know. It was a rate case before Justice Greenbaum in New York.

Q. Now what other appraisal did you make down there?

A. The water front? I do not think there were any more that I know of.

Q. You do not think you made any other?

A. Oh, yes; at the foot of Gowanus Canal.

Q. How far is that from this property?

A. About one mile.

Q. Any analogy between that kind of property and this?

A. No.

By the COURT:

Q. Where does the Gowanus Canal come out on the bay with respect to the street?

A. Columbia Street.

Q. Isn't this property more than a mile from Columbia Street?

A. It might be one and one-half; there are sixteen blocks to the mile. [Court, witness, and counsel examine map.]

179 By Mr. BUCHNER:

Q. How much do you value that property at?

A. I do not seem to have a memorandum here.

Q. You havn't it?

A. I do not seem to. It may be in my grip here. [Secures document from grip and examines same.]

Q. How much a square foot?

A. One dollar and seventy-two and one-half cents.

Q. For whom were you testifying?

A. The owners employed me.

Q. The construction company?

A. Yes.

Q. Do you know how much was finally fixed for the value of that property?

A. When I say yes I am not very sure; it was a very small amount; politics.

Q. Seventy cents, wasn't that the amount?

A. I am not very sure.

Q. That was in 1912 when you made this?

A. Yes; politics entered into that.

Mr. BUCHNER. I move to strike that out.
The COURT. Strike it out.
Q. You could not put a fourteen hundred foot pier there?
A. There were a slip there.
Q. Wasn't there a pier there?
A. No.
Q. Isn't there one now?
A. They are building some there now.
Q. Hasn't one of them been completed more than three years?
A. No; they are not completed yet.
Q. None of them are completed yet?
A. No; not yet.
Q. When were you there last?
A. About a week ago.
180 Q. And no pier is finished?
A. No pier is finished, I think Mr. Pounds will bear me out.
Q. Are you quite sure?
A. I am not quite sure, but it does not look as if it was finished.
Q. You say you keep records in your office of all sales, about one hundred thousand sales?
A. Yes, sir.
Q. How many of those cover water-front property between Atlantic Avenue and Fifty-sixth Street?
A. I think five or six of them.
Q. Over what period of time do they extend?
A. They extend over fifteen years, I guess.
Q. How many of them were previous to 1908?
A. Three or four of them.
Q. That only leaves one or two between 1908 and 1918?
A. I am only guessing; I had them all in my pouch.
Q. When did you look at them last?
A. About a week ago.
Q. Preparatory to testifying here?
A. Yes.
Q. Where did you get the consideration that you put on those records of yours?
A. Different sources.
Q. Well, what does that mean?
A. That means sometimes I get it from a buyer, sometimes from a seller, sometimes from the records, which are not very reliable but which you can confirm by your acquantance of a great many years here of nearly everybody.
Q. Were any of those sales which you talk about, upon which you base your estimate of this value sales of which you yourself had a personal knowledge either as principal or as broker?
A. No.
Q. None?
A. No.

181 Q. As a matter of fact, Mr. Porter, have you ever had any dealings as principal or as broker in this property, that is water-front property of Brooklyn, from Atlantic Avenue to Sixty-fifth Street?

A. Except as lessee.

Q. You represented the lessee or you were the lessee?

A. I made a lease, yes.

Q. Of what property?

A. Part of the Kings County Lighting Company property.

Q. Part of that?

A. Yes.

Q. When?

A. About three or four years ago.

Q. Do you know how long ago it was?

A. I will get it exactly for you. [Examines record.] The lease was dated September 1st, 1917.

Q. Is that a pier they leased?

A. No, it was part land and they built the pier themselves. They put sixty-five thousand dollars of improvement on it.

Q. Do you, Mr. Porter, know of a single sale that has been made within ten years previous to 1918, let us say, over Gowanus Canal at Sixty-fifth Street at two dollars a foot?

A. Foot of Court Street.

Q. That isn't there?

A. It is there.

Q. Is Court Street between Gowanus Canal and Sixty-fifth Street?

A. I was talking at the time about South Brooklyn water front. No, if you confine it to that territory.

Q. You say that the character of water front all around the city is different and that there is not any analogy between most sections of South Brooklyn?

A. I did not say there was not; I said there are some, but sometimes not very much.

Q. They both are land fronting on water, that is the only analogy?

A. That is not the only one, but it is the principal one.

182 Q. From Twenty-eighth Street to Sixty-fifth Street do you know of a sale between 1908 to 1919 at one dollar and fifty cents a square foot?

A. There was not any sales at all except one.

Q. How many sales have taken place in ten years previous to 1918?

A. Just one that I ever heard of.

Q. What was that?

A. That was the sale testified by Mr. Graham, the Bergen sale.

Q. Do you know anything about that?

A. Except from him.

Q. What you heard him say here?

A. What I heard him say many a time.

Q. Did you have the Bergen property for sale?

A. I did.

Q. How long?
A. Twenty years.
Q. From when?
A. For twenty years past.
Q. You mean from 1895 to 1915 you had it for sale?
A. Sure.
Q. At what price?
A. Five hundred thousand dollars.
Q. When did they give you that?
A. Twenty years ago.
Q. And they never changed it?
A. No.
Q. Do you know what they got for it?
A. I do.
Q. How much?
A. Three hundred and twelve thousand five hundred dollars.
Q. And they never told you that you could sell it for anything less?
A. I never had anybody buy it or be interested, so the price never came up, except the price on the books.
Q. Five hundred thousand dollars was the price put on that in 1895?
A. The price twenty years ago.
Q. Now do you figure between 1895 and 1915 property on South Brooklyn water front got more or less valuable?
A. More valuable.
Q. Much more?
A. Yes.
183 Q. That is why they sold it for about three-fifths of its market value?
A. Because it was pocketed there.
Q. Wasn't it bought by the E. W. Bliss Company?
A. It was.
Q. About 1915?
A. About 1915.
Q. Didn't you know at that time the Bliss Company was extending their plant to keep up with the demand for munitions and they had to buy?
A. It was a mercy that they had to buy it because nobody else wanted it.
Q. It was the only piece of property down there that would suit their purposes, wasn't it?
A. Yes.
Q. How many piers do you think they could have run out on this Langley property?
A. About fourteen hundred feet long and one hundred feet wide, just the same as the Kerr pier.
Q. How much do you think it would cost to improve the Langley property in 1918?

A. What?

Q. How much do you think it would cost to build these piers in 1918?

A. I did not think much about it. I did not take that into consideration when I was appraising a piece of property what it would cost to build.

Q. Did you take into consideration whether or not it was possible and practical to put these improvements on the property at that time?

A. Yes, everybody knows that.

Q. You could have done so?

A. If I took the trouble.

Q. You think you could have built these piers in April, 1918?

A. Sure.

Q. You could have gotten material and men enough?

A. Except that there was a scarcity of material. I did not take that into consideration.

Q. There was a scarcity of labor?

A. Yes.

184 Q. You did not figure that in at all?

A. No.

Q. Will you tell me this, Mr. Porter, what did you figure in when you valued this property?

A. I took into consideration all the sales that have been made on the Brooklyn water front.

Q. All the sales that have been made what?

A. On the Brooklyn water front.

Q. For how long a period?

A. For perhaps ten years.

Q. And how many sales were there?

A. I will give them to you if you want them.

Q. I just want to know what you figured?

A. I have told you two or three times. If you want me to go over it I will give you every one.

Q. If you answer my questions we will get through here some time? Now suppose you answer that. How many sales did you take into consideration in figuring this value? You do not have to look at that to tell me.

A. Of course.

Q. Have you got a calculation there that you made from these sales?

A. Sure.

Q. A sheet that you worked out this value from?

A. No, not at all. That is in the waste basket long ago.

Q. That was your idea of the relative importance of the figuring you did on which you based your value?

A. To keep all the superfluous memorandum you make, you make hundreds of them.

Q. Was that your idea of how much importance the figuring you did from sales in figuring this value out, that you could throw it away and it did not mean anything?

A. I do not understand the question, it is ambiguous.

Mr. RIGGS. Objected to.

The COURT. I think the question is proper. If the witness
185 has an explanation, of course, we will give him full opportunity to present it.

By the COURT:

Q. The question is, Is it your idea that the estimates that you made of values which you put down on paper were of so little value that you could throw them in the scrap basket?

A. Really I do not know whether I made any estimate at all.

Q. What papers were they that you threw away?

A. Simply multiplying 1,714,322 square feet by two dollars.

Q. That is what you meant when you said you threw the paper in the basket?

A. Certainly.

By Mr. BUCHNER:

Q. That is the only figuring you did in fixing this value?

A. No; I gured what other property was sold at a square foot.

Q. What other property?

A. A dozen pieces of property.

Q. What dozen?

A. Do you want me to give them to you?

(Adjourned to 2 p. m.)

DAVID H. PORTER, resumed.

Cross-examination by Mr. BUCHNER (continued):

Q. There are, as I understand it, Mr. Porter, these sales that you state you had in mind were the ones from the Berger Estate to the E. W. Bliss Company, New York Dry Dock Company to the Jay Street Terminal, Lotus Realty Company to the city of New York, Cutting Estate to the city of New York, Howard Wardell to
186 James Shewan and Edward Shewin?

A. Here is another one.

Q. May I have it?

A. Might I ask for the map, Mr. Riggs?

Mr. RIGGS. Where is this property?

Q. Give me the name?

A. From J. P. Fairchild, receiver for the Atlantic Dock. The purchaser is Ramberg Iron Works. That was sold on April 20, 1918.

Q. For how much?

A. $625,000.

Q. The square-foot value?

A. $1.60 per square foot. There is a half a block of that not water front at all, but that was included in the sale.

Q. That is really located on what is commonly called Red Hook Point?

A. That is about what it is called; yes, sir.

Q. That is bulkhead, not pier property?

A. That is bulkhead.

Q. Were there any improvements on it at the time it was sold?

A. No, sir. There was an old factory but it was all torn down. The improvements down there amount to nothing.

Q. Were those streets open?

A. Yes, sir. Let me quality that. Walcott Street is open down to the water. Dykman Street is open down to the water. Coffey Street is open 425 feet from Ferris Street, not down to the water.

Q. And Sullivan Street?

A. Is open.

Q. And Ferris Street is open all along?

A. Yes, sir.

Q. In figuring this $1.65 on your theory——

A. $1.60.

Q. I should have said $1.60, the value of these streets having been opened is reflected in this property?

A. Yes, sir.

187 Q. That is one of the differences between this property and the Langley property?

A. That would have been one of the restrictions in the square-foot figuring.

Q. I understood you said when a street is opened it is reflected in the adjoining property.

A. That is right.

Q. To be consistent, shouldn't you find out the area in Wolcott Street and that on Sullivan Street, that on Dyckman Street, and Coffey Street, right there, and add that in so as to make up the number of feet you divide into to get the value per square foot?

A. I do not know what you want it to be consistent with.

Q. I mean, if you use the same measure of value on the Ramberg Iron Works property as you have talked of in the Langley Estate, you would have to add in the streets to get the same measure of value, relatively, that you got in the Langley estate?

A. It is not the same kind of property at all.

Q. Entirely different?

A. Not entirely. It is water front, but it is not the same class of property at all.

Q. So is the beach at Neponsit and Coney Island water front?

A. That is water front, but it is the only comparison you can make with property of this kind.

Q. On what theory do you use that sale for the measure of value in the Langley Estate?

A. Just to add to your store of knowledge.

Q. The $1.60 a square foot is not any part of the measure of value of the Langley property?

A. One is not set up against the other at all, but it does add to your store of knowledge of what has happened in the water front, enables you to reach a proper price for the Langley property.

188 Q. There are just two pieces of property, possibly three, in the ones that you gave us that are in the immediate vicinity of this Langley property; that is so?

A. That is so.

Q. Let me ask you, Mr. Porter: Do you agree with what Mr. Graham has told about land values from 1895 to 1918 in the South Brooklyn section of Brooklyn, on the water front, that during all that time they have been increasing?

A. They have been increasing. I don't think I agree with the percentage.

Q. You admit that they have increased, or you think so?

A. I know they have.

Q. Let us divide that into three periods. Take from 1895 to 1908. How much increase do you say there has been in its value?

A. As shown by the sales, 55 per cent.

Q. 55 per cent from 1895 to 1908?

A. As shown by the sales.

Q. Now, on what sales do you figure that that increase has been shown?

A. Excuse me.

Q. What sales do you speak of when you say the sales show this measure of increase?

A. What the Bush people paid for their property way back in 1900 and then what the city paid in 1908.

Q. Now, between 1908 and 1915 what do you say is the measure of increase in the values along there?

A. Ten to twelve and one-half per cent per annum.

Q. Your other figure was for the entire period, wasn't it? That 55 per cent covered from 1895 to 1908?

A. It covered the period, because previous to 1900 that was a desert down there——

Q. I just want to make sure we did not misunderstand each other.

A. All right.

189 Q. When you say 12½ per cent, you mean that if any piece of property was worth $100 in 1908, it was worth $87.50, for instance, in 1907, and then 12½ per cent of that in 1908, or in 1906?

A. I am afraid I am confused now.

Q. Don't let us have that happen. Do you mean that if there were a piece of property down there that was worth $1,000, we will say, in 1908, then in 1909 it would be worth $1,125?

A. At least $1,100 or perhaps $1,250.

Q. And then in——

A. Wait a minute.

Q. It would be 12½ per cent of that?

A. Just a moment. Ten per cent would be $100, that will be $1,100; 12½ per cent would be $125, that would be $1,125. Did I say $1,250? Make it $1,125.

Q. $1,125?

A. Yes.

Q. Then in 1910 you would add 12½ per cent of $1,125?

A. I think I would add 10 per cent minimum, and 12½ per cent as the maximum. Say 10 per cent and you will not go far astray.

Q. Ten per cent, then?

A. Yes.

Q. And then the following year there would be another accretion of ten per cent?

A. Yes, sir.

Q. And that continued until 1915?

A. I think so. That is a matter of offhand opinion.

Q. Now, between 1915 and 1918, how much would you say the value had increased?

A. About ten per cent per annum.

Q. About ten per cent more per annum?

A. Yes.

Q. So that really you think that between 1908 and 1918 the increase per annum was about the same?

A. Or rather, any property would have about doubled in value.

Q. How much do you think the Langley Estate probably was worth in 1895?

190 A. Oh, well, I would not want to give an opinion. In 1895 it was a howling wilderness.

Q. When did you know it first?

A. In 1896.

Q. That would be the following year?

A. Yes.

Q. How much would you say it was worth in 1896?

A. I did not give it much attention.

Q. When did you first give it attention?

A. That was in 1912, wasn't it, when it was condemned by the city of New York?

Q. Did you appraise it as of 1912?

A. I think so. That is my memory.

Q. Did you see it in 1908?

A. Oh, yes. From 1896 for nineteen or twenty years I passed it twice a day.

Q. How much do you think it was worth in 1912?

A. $1.65 a square foot. And the award was made at $1.44.

Q. That never was completed, that sale, was it?

A. They never completed it, for a reason.

Q. It never was completed though? The same as any other offer of sale was not accepted?

A. That was not a sale; that was a condemnation.

Q. And they never finished it?

A. They never bought any property—they never paid the money.

Q. They bought the rest of it in there about that time, or a little after that, between the two strips?

A. They bought it before that time.

Q. How much?

A. In 1908 they paid $1.10 a square foot for it.

Q. This Jay Street terminal property that was sold to the New York Dock Company was sold in 1911 for $800,000; is that right?

A. That is right.

Q. How much property was sold?

A. It had a frontage on Water Street of 487 feet 10 inches,
191 and it had a depth—it is somewhat irregular, because it went into—that would also be shown on the map there——

Mr. RIGGS. A little louder, Mr. Porter.

The WITNESS. Yes.

A. (Continuing.) 481 feet at one side.

Q. Which side?

A. Towards the bridge, the west side.

Mr. RIGGS. Will you point out where that is on this chart?

(Witness indicates on chart.)

Mr. RIGGS. Witness indicating the property just north of the Brooklyn Bridge upon the chart.

The COURT. The side north or south?

Mr. RIGGS. North and east.

The COURT. On plaintiff's exhibit what?

Mr. RIGGS. That has not been marked in evidence. On the chart marked "Hudson and East Rivers from 67th Street to the Blackwell's Island Bridge."

Q. How much of that was improved?

A. About two-thirds or three-quarters of it. They were old stores, obsolete buildings.

Q. How many of them were there?

A. Two.

Q. How tall?

A. Five story.

Q. Warehouses? And how big?

A. Old storage buildings.

Q. How big?

A. One was 190 feet by 337—10 wide, wth an L 87 feet 6 by 129 feet 6 inches.

Q. Was that five stories high, too?

A. Yes, sir; and the other was 190 by 150.

Q. Anything else on that property?

A. Three little docks.

Q. How big?

192 A. One of them was 376 feet long by 21 feet 9 inches wide; another one was 301 feet long by 23 feet 3 inches wide; another one was 255 feet 4½ inches by 105 feet 6 wide.

Q. And how do you fix the value of the land and the buildings; I mean, what theory of measurement do you use as to their relative values?

A. I found in my judgment what the buildings add to the property, and then take the balance for the land.

Q. You appraise the buildings and deduct that from the purchase price?

A. Yes.

Q. Did you appraise the piers?

A. Yes.

Q. Did you allow anything for them at all?

A. The fact of the matter is they are pretty near all obsolete.

Q. You went on that theory?

A. If I had any object in the world—perhaps I should not say this—if I had any object in the world, my object would have been to make them as big as possible.

Mr. BUCHNER. I move to strike that out.

The COURT. Motion granted.

Q. The question is, you went on that theory?

Mr. RIGGS. That the piers were obsolete.

The WITNESS. That the piers were not very much good.

Q. You went on the theory they were obsolete?

A. That they were not very much good.

Q. You went on the theory that the buildings were in the same condition?

A. Yes, sir.

Q. 1911 this property was sold?

A. Yes, sir.

Q. Are the piers still there?

A. I don't know.

Q. Have they torn either one of those buildings down?

A. No; I think the Arbuckle people are using them for storage.

193 Q. Nine years after you say they are practically valueless?

A. They are practically valueless as buildings, because that sort of building has gone out of the market. The Arbuckle people might use them to throw boxes in, but they do not put much value on things like that.

Q. Isn't that the measure of what anything is worth, what use it can be put to?

A. The best measure of value is the use of the property.

Q. Is there any better use the Arbuckles could get out of this property than what they are getting?

A. Yes; I think if they tore them down and made larger buildings out of them, they would do better.

Q. Do you know the Arbuckle people had to buy this to get an ingress and egress to the water?

A. Yes.

Q. They could not have expanded without buying this?

A. No.

Q. They were the only ones wanted it?

A. Apparently so.

Q. How do you fix $600,000 as the measure of the land value of that——

A. Deduct two from eight, leaves six.

Q. How do you figure $200,000?

A. I examined the buildings.

Q. How much did you appraise the docks at, or the piers?

A. I haven't the particulars of the appraisal here at all. And I was one of three who appraised them. The one was Mr. Taylor, and the other one was Mr. Troy, who appraised them for the dock company. As to whether they should sell those for eight hundred thousand dollars, and they agreed.

Q. Was the appraisal made of this entire property?

A. It was.

194 Q. Wasn't the appraisal made for the purpose of finding out whether or not the value they were offered was as much as they could get for it?

A. That was the purpose of it.

Q. You made a purely arbitrary value of this thing yourself?

A. Oh, no; it is not without reason.

Q. Will you tell me, now, you don't know at what price you fixed any of these piers or buildings, or anything of that sort?

A. I haven't the particulars of it here, but I have the results.

Q. Is that the same as the Langley property?

A. No.

Q. Anything like it outside of being on the water?

A. The only resemblance is, it is on the water.

Q. That is all?

A. That is all.

Q. And yet this is one of the sales you used in reaching the value for the Langley property?

A. That is one I knew about.

Q. Isn't that one that you used?

A. I did not use any of them specifically.

Q. Are you willing to say now, Mr. Porter, that in your opinion, as an expert, which you have given here, you have paid no attention as a fact to any sale?

A. I did not say anything of the kind, or I don't say it now. I did pay attention to every sale I know about as adding to my store of knowledge as to what property sold for, how it could be used, and everything about it in order to arrive at a fair decision as to what its value.

Q. Getting away from that general store of knowledge of yours that you refer to for the time: Didn't you tell me in the half dozen sales you took as fixing the value of the Langley property, that
195 this sale of the Dock Company to the Terminal was one of them?

A. That is one I knew about.

Q. That was one you specifically referred to?

A. I referred to it.

Q. Did you just refer to it to prove it has not any bearing on this?

A. Because you asked me.

Q. Did you, in your calculations, mental or physical, or any other kind of calculations you made in fixing the value of the Langley property, refer to this particular sale?

A. Not specifically.

Q. You did not?

A. Not specifically. I referred to it, but not specifically; it is not the same kind of property.

Q. Or do you figure this sale had any bearing on the Langley Estate?

A. Except adding to your store of knowledge of sales of water front. That is the only thing it does.

Q. Do you figure those things out of your mind, your store of knowledge, or do you figure them from the actual facts of the sale, the physical facts of the sale?

A. What facts?

Q. You talked about your store of knowledge before, didn't you?

A. Absolutely. They bear a relation, not a specific relation, by reason of the fact that the property is not identically the same.

Q. Then tell me this: What relation is there between the arbitrary price of $600,000 you put on this land in 1911 and the price of $2 a foot front you put on the Langley property in 1918? Tell me that relation.

A. There is no specific relation except it enables you—what information you get about any property enables you better than a person who don't handle those things——

Q. Have you any other——

A. May I continue?

Q. Go ahead.

196 A. To arrive at the figure, the fair appraisal of the piece of property in question. That is why we are employed to appraise property, because we have knowledge of sales.

Q. You know that is not quite correct, that any man can appraise this property and appraise property anywhere. You could not appraise water front in Newport News?

A. I would not try to. I am referring to anywhere in Brooklyn, where we all know here.

Q. Then, would a man who knew values in Manhattan, Staten Island, down to Bayonne, and on the Jersey coast be better qualified than you to fix values for this particular property, do you think?

A. I don't know.
Q. Do you think so?
A. I have no thought on the question.
Q. You don't think about that at all?
A. (No answer.)
Q. In these properties that you have given me and these sales, tell me if, in your opinion, you paid attention to any one of these sales in fixing the value of the Langley Estate.
A. Yes.
Q. Which one?
A. Two sales made to the city of New York in 1908 are the nearest and the most like this of anything else.
Q. Now, those two pieces of property, the one from the Lotus Realty Company is very close to this Langley property?
A. It is in between them.
Q. It is the piece in between?
A. That is right.
Q. You tell me there was a sale to the city in 1908.
A. Yes.
Q. When was it sold to the Lotus Realty Company?
A. I understand some time previous.
Q. What do you mean, you understand? Didn't you look that up?
A. No. It is the last sale you look up.
197 Q. Was there any reason for not looking it up?
A. Not a particle.
Q. Suppose I tell you that in February, 1907, that was sold to the Lotus Realty Company; would that refresh your recollection?
A. I understand it was sold; Mr. Graham has testified it was sold.
Q. I am not asking you what you understand about what you were told. I am asking you, do you know just the year previous it was sold to the Lotus Realty Company?
A. I understand it was.
Q. How much?
A. I really don't know. Mr. Graham knows all about it.
Q. You don't know that?
A. I do not.
Q. I thought you took into consideration all the sales down there?
A. Why, sure, but that was a previous sale—why, at one time, the whole city of New York was sold for a bunch of Indian trinkets. Would you take that into consideration?
Q. Was it a year before any appraisals you have made?
A. No. There was no reason for my omitting anything.
Q. Suppose you stick to the facts. I am asking, do you know that property was sold in 1907 to the Lotus Realty Company?
A. I believe I heard so.
Q. Do you know the consideration that was paid?
A. I am not sure now. Wasn't it 70 cents?
Q. 69.3 a square foot?
A. That is pretty nearly 70.

Q. How much did the property in the Brooklyn water front improve between 1917 and 1918?

A. 10 to 12½ per cent.

Q. That was really worth 75 cents—77 cents, to give you the full benefit, at the time it was sold to the city?

198 A. What a piece of property sells for does not always tell what it is worth. Sometimes it sells for what it is worth, and sometimes less.

Q. Didn't you tell me 10 per cent a year is a fair measure of value?

A. That is right.

Q. Isn't a fair measure of value in a sale of this sort what a willing buyer will give a willing seller?

A. If one does not take advantage of the other.

Q. Don't you know when the city buys property as a rule the man selling has the advantage? A. Certainly not; the city can condemn and take it from him.

Q. If on your statement, Mr. Porter, that property sold for 70 cents a square foot in 1907, then it really in 1918, allowing 10 per cent for each year, as you say, is worth about $1.50, isn't it?

A. That is, if you multiply—if instead of using common sense, you use a mathematical table.

Q. Do you ever use mathematics in figuring your values?

A. Very often.

Q. Do you only use common sense?

A. Both.

Q. Is common sense a large factor in judging real property?

A. Yes, sir.

Q. What advantage has a realty expert, then?

A. The man that has the most common sense is the best expert.

Q. The man who has the most common sense makes the best expert?

A. That is what makes the best expert.

Q. If you use common sense, and look at those things, you can disregard the fact of previous sales?

A. If you have common sense, you don't disregard those things.

Q. Will you tell me what common sense you used in figuring these sales?

A. I can not tell you that.

199 Q. Tell me how you did it?

A. If you take $1.10 a square foot in 1908, in 1918 the property cost the City of New York $2.16 a square foot, it actually cost them that much money.

Q. You are taking a purely arbitrary value of $1.10 in 1908. Why not take 69 cents in 1907?

A. Because that was too cheap.

Q. Before that it was sold for that?

A. Yes; because——

Q. Don't you realize it is just as likely some of these sales on which you base your figures were sold for too much?

A. I don't know of any.

Q. Isn't it possible?

A. It is not impossible. I know of a piece of property the other day was sold for too much, but you would not allow me to testify to it.

Q. You do agree sometimes that people get more than the property is worth?

A. Yes, sir.

Q. As a matter of fact, out of all those sales that you have spoken of, the only ones that in any way resembles the Langley Estate is this particular portion of the City of New York's property that lies between the two portions——

A. The two blocks there.

Q. Then the one that was purchased at the same time?

A. Yes, sir.

Q. Was that the same?

A. Yes, sir. Pretty near the same, but not exactly; there was very little land there, only about 4,000 square feet of land altogether.

Q. Was that a larger strip than this?

A. It was.

Q. That was the larger?

A. Oh, yes; it was eight blocks.

Q. Which made it more valuable, the fact it is all together?

200 A. If you get too much of it, sometimes as an expert over in the City of New York said at one time, "plottage reverses itself."

Q. Were not the streets paved in 28th Street at that time?

A. Where?

Q. First Avenue and Second Avenue.

A. First Avenue, just the same as Second Avenue, but not the street down on to the property, because it was all under water.

Q. The intersecting streets to the property?

A. Yes, sir.

Q. Considerably nearer to 39th Street Ferry?

A. Yes, sir.

Q. And considerably nearer to transportation in 1908, weren't they?

A. No.

Q. What transportation did you have down at 59th and 60th Streets in 1908?

A. Just the same as 1918, with the exception that you had a connecting railroad in 1918 you did not have in 1908.

Q. You have a subway in 1918 you did not have in 1908?

A. Yes, sir.

Q. Those things don't mean anything in the value of property at all?

A. Yes; they do.

Q. Didn't the property at 28th Street have a great deal more transportation facilities than the one at 59th Street?

Mr. RIGGS. When?
Mr. BUCHNER. In 1908.
A. I don't think so.
Q. Didn't the Fifth Avenue L run down there?
A. But the 5th Avenue L runs past the other property, too.
Q. But it only ran to 65th Street?
A. Yes, sir.
Q. And it was a whole block farther down from the city?
A. Farther down from the city? It was in the city. It was in the city.

201 *David Porter—For Plaintiff—Redirect.*

Q. Weren't the earlier Bush buildings built nearer 28th Street?
A. Oh, yes.
Q. That does not reflect in the property, either?
A. It helps.
Q. And those things make a difference, do they?
A. Yes, sir.
Q. Do you add them up when you figure it?
A. I consider everything connected with it.
Q. Well, you think property located at 28th Street and 59th Street have the same value in 1908 per square foot?
A. Yes, sir.
Q. The same value?
A. Yes, sir.
Mr. BUCHNER. That is all.

Redirect examination by Mr. RIGGS:

Q. I direct your attention to the sale you refer to, the Lotus Realty Company, 1907, Mr. Porter. Did you hear Mr. Graham's testimony as to the dimensions of the two pieces of property of the Lotus Realty Company?
A. Yes, sir.
Q. Do you know the dimensions of those two pieces in your mind?
A. I do not.
Q. Is it a fact that a piece of property gathered together of two separate pieces of property sells for more than the two separate pieces sell for separately?
A. Very often.
Q. Was, in your opinion, the price of 70 cents a square foot the real market value of that property as a whole in 1907?
A. No, not at all.
Q. You spoke of the city condemnation of the Langley property. Do you mean by that you testified as a witness in that proceeding?
A. I did; yes, sir.
202 Q. That was before the commissioners of appraisal appointed by the Supreme Court?
A. Yes, sir.

Q. Who were those?

A. Mr. Troy, Mr. Taylor, and the other gentleman—I have since forgotten his name.

Q. When did they make their decision in the matter?

A. I think about 1913, wasn't it?

Q. And you also referred to the fact that the city had not—did not complete the purchase?

A. Did not complete the transaction.

Q. That is, you mean to say, title to the property had not vested in the city?

A. That is right.

Q. You also spoke of a reason for the city not completing the purchase. What was that?

A. They didn't have the money.

Q. I direct your attention to the New York Dock Company's piers. Do you know anything about them?

A. The map shows there, and I have in my office the depth of every one of them, but I haven't it here.

Mr. RIGGS. I offer in evidence this map, referring to map marked "Hudson and East Rivers from 67th Street to Blackwell's Island Bridge."

The COURT. The court is receiving it to aid the court in interpreting the significance of the testimony of the witness.

Mr. RIGGS. That is the purpose for which it is offered.

(The map referred to was received in evidence and marked "Plaintiff's Exhibit S" of this date.)

Q. Mr. Porter, when you were requested to value the property of the Langley Estate and testify for them in this proceeding
203 how many square feet did I tell you to assume there were in the property?

A. 1,714,322.

Q. And in making your valuation did you adopt a unit of value?

A. I did.

Q. And took that number of square feet as being correct?

A. Yes, sir.

Q. Did I also inform you I would like the value of the property upon the assumption the city owned 61st, 62nd, and 63rd Streets?

A. You did; yes.

Q. What was the valuation that you gave me?

A. The same valuation; no difference.

Q. You appraised the property of the Morse Dry Dock Company in 1907, Mr. Porter?

A. Yes, sir.

Q. What was the appraisal per square foot you made at that time?

A. $1.10.

Q. Did you so report to the Morse Dry Dock people, or the persons that employed you?

A. Yes, sir.

Q. That was your estimation of its value at that time?

A. Yes, sir.

Q. Is that your judgment of the value of the Langeley property at that time?

A. Oh, yes, it is the same kind of property.

Q. Reference has been made to the fact that since 1908 there were only three sales of property in any way similar to the Langley property on the South Brooklyn shore, consisting of the sale from the city of New York from 28th to 36th Streets, and the sale of the Lotus Realty Company. Do you know of any reasons why there were not any other sales?

A. No more to sell.

Q. Why?

A. The only thing for sale now is 100 feet wide, belongs to the B. R. T., or one of the companies there, adjoining the Bliss place.

204 Q. During the period 1906 to 1913, what, if anything, was happening in regard to the Langeley property?

A. The condemnation was hanging over it.

Q. What other property was involved in that condemnation proceeding?

A. The Kenyon property, immediately adjoining, to the north.

Q. Since that condemnation proceeding was discontinued, what happened?

A. They built a pier on it and rented the pier and occupy the other part.

Q. What, in your opinion, is the effect upon the salability of property of condemnation proceedings pending by the city of New York?

A. It stopped the sale; nobody wants to buy it.

Mr. BUCHNER. I object to that.

Q. I mean, what effect does it have, in your opinion, of the appointment of commissioners by the supreme court of the city of New York in order to condemn property?

A. Stops the sale of it, any private property.

Q. When were these commissioners appointed, if you know?

A. I do not know.

Q. Was it 1906?

A. I heard 1906. That is all I know about it.

Mr. RIGGS. That is all.

Recross-examination by Mr. BUCHNER:

Q. Do you think that if the Langeley property was all together, it would be worth more?

A. I don't think so.

Q. So that to add together two pieces of property makes it worth more when the city gets it but not when the Langley estate gets it?

205 A. It has nothing to do with that. It is all unimproved. Suppose a piece——

Q. Wasn't this Lotus Realty Company property unimproved?

A. Yes.

Q. And adding that together made it worth more?

A. I didn't say that.

Q. You do not think so?

A. No.

Q. You do not think it was worth a bit more assembled than unassembled?

A. They are all big pieces.

Q. Will you answer that question?

A. Not a bit.

By the COURT:

Q. I understand you to say, in your judgment, that with regard to the property that the Lotus Realty Company assembled, that the act of assembling by the Lotus Realty Company, in your judgment, gave a certain added value per square foot to the entire tract?

A. I didn't say that at all, your honor. Somebody else may have said it, but not me.

Re-redirect examination by Mr. RIGGS:

Q. What, in your opinion, would be the best use to which a strip of property extending from westerly side of First Avenue to the pierhead line 185 feet wide could be put?

Mr. BUCHNER. I object to this. It is one of two things. It is not proper redirect, or else an attempt to cross-examine his own witness.

The COURT. On the first ground I will permit the question and on the second ground it is overruled.

206 Mr. BUCHNER. I think you should make that more definite.

Q. The property acquired by the Lotus Realty Company in 1907?

A. By itself, it could not be used to very great advantage at all; it has to be taken in connection with other property.

Q. What, in your opinion, could be the best use to which a plot 230 feet wide adjoining such a piece could be put separately?

A. That could probably nearly be used by itself.

Q. In your opinion, would not the front of 422 feet in width create a greater value for the combined parcels than the two strips separately?

A. Yes, sir.

By the COURT:

Q. Isn't that an instance where assembling separate parcels of property adds to the total value?

A. Yes, sir; that is what we call plottage.

By Mr. RIGGS:

Q. Mr. Porter, did I understand you, when you said you thought that the property along the South Brooklyn shore from 1895 to 1908 had only increased 50 per cent?

A. 55 per cent. Sales would show that.

Q. From 1895?

A. You know, there is a long time it did not increase at all because it was a howling wilderness, and it was only when the Bush people came there in 1900 that made it interesting at all.

Q. Does that apply for the entire period from 1898 to 1908, or do you mean per annum?

A. For the entire period. If you know the sales and figure them up you will find that is just what happened.

207 Re-recross examination by Mr. BUCHNER:

Q. Do you still insist adding the Langely property together would not make it more valuable?

A. Wait now. Adding them together, it is 550 per cent. That is a mistake. It should be 550 per cent, instead of 55.

Q. You don't call that much of an increase in value?

A. It is. I am glad you called my attention to it.

Q. Do you still insist that adding that 260 feet of frontage of the Langley property to the other end, you would not increase the value of it by plottage?

A. No, I don't think so, because you can use this by itself, and can use the other piece by itself.

Q. You could not use 285 feet by itself but could use 260 feet from the Langley estate?

Mr. RIGGS. He is misquoting him.

Q. What were the other figures?

A. 185.

Q. And what was the other one?

A. I cannot remember. How much——

Q. Don't ask him. You answer that.

A. I cannot remember it.

Q. How could you make such answers to Mr. Riggs and now you cannot remember when I ask you?

A. I will answer the question if you tell me the size of it.

Q. You told him what you thought he was asking you. You gave him the answer you thought he wanted?

A. I did not care what he wanted.

Q. How much do you add to that 185 to make it valuable?

A. Up to 260.

Q. Up to 260?

A. Yes, sir.

Q. That 260 foot strip is all right?

A. Yes.

208 Q. So that if part of this Lotus Realty Company was 260 you do not add anything to it?

A. Part of what?

Q. If part of the Lotus Realty Company plot was 260 feet, you do not increase that by assembling it at all?

Mr. RIGGS. I object to that.

Q. That 230 feet was as good as the 260 for the purpose of piers?

A. Scarcely.

Q. Why not?

A. Because it was 30 feet too little.

Q. Why do you need 260 feet?

A. In order to put one pier there and get proper slips between the two.

Q. How much do you need for slips?

A. It would have to be at least—what the city of New York laid out was 275 between the slips.

Q. You could not put any——

A. And the piers 150 feet wide. I think that was too much.

Q. Will you tell me how, if you did not get 275 feet by assembling two plots, how you were any better off——

A. You could use it with some other property.

Q. But you had 175 feet on your theory, didn't you?

A. No.

Q. You had that much water on each side?

A. Between each pier, I told you, it is about 137 feet 6, for each pier.

Q. If you did not have enough for 275 on each strip, if the man alongside of you ran a pier out on one-half of his line, you could not run anything out for 275 feet?

A. You could put a pier out at the end of a block.

Q. No matter where the other man's pier was?

A. You can travel over other people's water. Yes, sir.

209 Q. But you would have to go 275 feet away from the other man's pier to build your pier?

A. But he would not build up against your line.

Q. If that is so, if somebody built the pier where the Kenyon pier is here alongside the Langley Estate, if their pier had been extended to here, the Langley Estate could not use that strip at all [indicating on map]?

A. The pier is not there; it is out in the center of the block.

Q. But there was not anything to prevent their extending it?

A. I don't think the dock department would allow them to do it.

Q. You don't think so?

A. I don't think so.

Q. There was nothing to prevent it?

A. Common sense of the dock department would tell them not to.

Q. As a matter of fact, the Langley people could not put a pier within 275 feet of this?

A. That is under the old regulations, the time we were talking of before 1912. It has been taken off since, so that it now is a matter of common sense and judgment where to put the pier.

Q. Were there any restrictions on at that time?

A. I think so. At the time they were condemning the Langley property I think the city of New York had those restrictions on.

210 CHARLES J. FARLEY, called as a witness on behalf of the plaintiff, and being duly sworn, testified as follows:

Direct examination by Mr. RIGGS:

Q. What is your address?

A. 1334 Lexington Avenue, Borough of Manhattan.

Q. What is your business?

A. My business is dealer in water-front property.

Q. What is your office address?

A. 30 Church Street.

Q. How long have you been dealer in water-front properties?

A. Since I left the dock department.

Q. What was your connection with the dock department, if any?

A. I was with the dock department 32 years.

Q. In what capacities?

A. Clerk, chief clerk, assistant secretary, first deputy commissioner, deputy commissioner.

Q. And during those 32 years had you become familiar with the water front of the city of New York?

A. Yes, sir.

Q. Have you personally examined various portions of the water front of the city of New York?

A. Yes, sir.

Q. Have you become acquainted with sales made by various private owners to the city of New York during that time?

A. Yes, sir.

Q. Are you familiar with the leases made by the city of New York of water-front property during that time?

A. Yes, sir.

Q. Do you know the values of water-front property in the Borough of Manhattan?

A. Yes, sir.

Q. Do you know the values of water-front property in the Borough of Brooklyn?

A. Yes, sir.

211 Q. And have you made a study of rentals received by the city of New York from its wharf property?

A. Yes, sir.

Q. Have you made appraisals for the city of New York or persons?

A. Yes, sir.

Q. What appraisals have you made?

A. I made appraisals for the New York Central Railroad of Piers (new) 32, North River, and 65 feet of the bulkhead adjoining. Appraised water-front property, pier and bulkhead between 13th and 14th Streets, East River, for John A. Bouker; appraised prop-

erty of the New York Tanning Extract Company in the vicinity of Freeman and Huron Streets, Greenpoint, consisting of two piers and stretch of bulkhead and upland; appraised pier and bulkhead property between 11th and 12th Streets, Hoboken, extending from Hudson Street to the bulkhead line; appraised property foot of Rector Street, Piers (old) 9, 10, 11, North River, and the adjoining bulkheads in proceedings for the acquisition of property by the city of New York; appraised property of the Jersey shore for Burns Bros.; testified as expert before the Interstate Commerce Commission; testified in condemnation proceedings for the acquisition of Rector Street property——

Q. For whom did you testify?

A. For the city of New York.

Q. Have you appraised any Jersey water front?

A. Yes, sir; the property extending northerly from the tidewater basin for the Tax Commissioners of Jersey City, and testified before the State board at Trenton.

Q. For whom did you make that appraisal?

A. For the Tax Commissioners of Jersey City.

212 Q. Are you familiar with sales of water front property in the Borough of Manhattan and the Borough of Brooklyn?

A. I think so.

Q. What measures do you take to keep yourself informed of sales?

A. I inquire from brokers and owners of piers of water-front property what prices they paid; examine whatever records I can find of what sales were made.

Q. Are you familiar with water-front property extending from the Gowanus Canal to 65th Street, Brooklyn?

A. Yes, sir.

Q. How long have you been familiar with that property?

A. Since 1898.

Q. Are you familiar with the property in 1908? When the purchases by the city referred to were made?

A. Yes, sir.

Q. Are you familiar with the improvements erected by the city of New York on the properties purchased?

A. Yes, sir.

Q. And familiar with the leases made by the city on that property when improved?

A. Yes, sir.

Q. Are you familiar with the property known as the Bush Terminal?

A. Yes, sir.

Q. Have you ever appraised the Bush Terminal property?

A. Yes, sir.

Q. For whom?

A. The War Department.

Q. When did you make that?

A. 1917, I think it was.

Q. Do you know the value of property between 58th and 63rd Streets on the water front, South Brooklyn, in April, 1918?

A. Yes, sir.

Q. Have you examined at my request the property of the Langley Estate with a view to testifying as to it, as of April, 1918?

A. Yes, sir.

Q. Have you heard the description of the property given by Mr. Graham on the stand?

A. Yes, sir.

213 Q. Have you anything to add or deduct from that description?

A. I don't think of any.

Q. What is the best use to which the property can be put, in your opinion?

A. The construction of piers and the erection of warehouses.

Q. Are you familiar with the earning power of property when so improved?

A. Yes, sir.

Mr. RIGGS. Any cross as to qualifications?

Mr. BUCHNER. No.

Q. What, in your opinion, was the fair and reasonable value of the property of the Langley Estate on April 6th, 1918, when appropriated by the United States Government?

A. $3,857,224.

Q. In making such appraisal how many square feet have you assumed were in the property?

A. 1,714,322.

Q. If the title to 61st, 62nd, and 63rd Streets, from the westerly side of First Avenue to the high-water mark was in the city of New York on the date I have mentionel, what, in your opinion, was the value of the property?

A. $3,857,224.

Q. That is the same?

A. Yes, sir.

Cross-examination by Mr. BUCHNER:

Q. Did you take a unit of value?

A. I did it both ways.

Q. What was the unit of value you picked?

A. $2.25.

Q. What?

A. A square foot.

Q. Mr. Farley, on that basis if you picked $2.25 a square foot as the value, musn't you really deduct 81,120 times $2.25?

A. I don't think so.

Q. If there is 81,120 feet less than 1,714,322, the value is 214 more than $2.25 per square foot, isn't it?

A. If you use a different divisor you are getting a different unit.

Q. Which way did you figure: Take the total value of the whole thing, and then divide it by the number of feet to get your unit of value——

A. Yes, sir.

Q. Then you did not use a unit of value?

A. I used it both ways, unit of value of $2.25 and took the earning power, capitalized it, and deducted the cost of the construction, and used it that way.

Q. You could not have started with that square foot value of $2.25 and gotten the same total with that 81,120 in or out?

A. It didn't come out the same. It came out $2.35, and I made it $2.25, as a round number.

Q. You said that on your figures you got the same value, whether this 81,120 feet was in or out, did you?

A. I said you get the same total value.

Q. You could not do that with the square foot as the unit of value?

A. I don't think I understand what you mean.

Q. If you figured this thing as a general whole, you might take 81,120 feet and disregard the fact whether it was in or out, it is possible, isn't it? But if you pick a unit of value a square foot and what you call the measure of the unit—which in your case you say is $2.25—then it makes a material difference the number of feet there are in this area, doesn't it?

A. As I say, my unit was really higher than $2.25, and I made it that for round numbers, and it comes out the same way.

Q. Are your values as inaccurate as that, that 8 cents a square foot on 1,714,322 square feet does not mean anything?

A. You take it one way it comes out $2.33. On a unit value
215 of $2.25 it comes out this figure, so therefore I accepted the lower figure to give the owner the benefit.

Q. To give the owner the benefit?

A. To give the War Department the benefit.

Q. So that you made two calculations and they were different, and you took the smaller one as the correct one?

A. Yes.

Q. Outside of Freeman and Huron Streets in Greenpoint, have you appraised any other property, water-front property?

A. That is about all.

Q. Was that improved or unimproved?

A. Bulkheads and filled in land and two piers.

Q. In Greenpoint?

A. Yes, sir.

Q. On a river or Newtown Creek?

A. On the river.

Q. How big a strip was it?

(Witness examines papers.)

A. I am sorry I haven't that with me, I thought I had.

Q. You haven't it?

A. I am very sorry I haven't got it.

Q. I understood you to say you had been dealing in water-front property since you left the dock department?

A. Yes, sir.

The COURT. When was that?

Q. When was that?

A. The first of January.

Q. Of this year?

A. Yes, sir.

Q. Before that you had not anything to do with the sales of property?

A. I had something; yes, sir.

Q. While you were in the employ of the city?

A. Yes, sir.

Q. You mean in your capacity in the dock department?

A. No sir.

216 Q. Outside of that?

A. Outside of that.

Q. What?

A. What?

Q. Yes. What had you done in relation to this water-front property previous to this?

A. You mean the water front of the port?

Q. Brooklyn.

A. I made that sale in Hoboken of the Hoboken property, and I made some other appraisals around for different private owners that I spoke about.

Q. Hoboken, that sale was?

A. Yes, sir.

Q. You really had no personal knowledge or contact with any of these sales down there in what we have called the South Brooklyn water front?

A. The sales? I really did not have anything to do with sales, excepting the sale to the Navy of that Bush property at Twenty-ninth Street, Brooklyn, and also the two Shewan leases in Twenty-eighth Street.

Q. Was that water-front property, that Navy sale you talk about?

A. One block back from the water front.

Q. It was not water front?

A. No.

Q. And a dierent measure of value?

A. Yes, I should think it was not worth as much back there as if it was on the water front.

Q. What do you consider all the items you must take into consideration in appraising water-front property? If you will give them slowly enough for me to write them down I will appreciate it.

A. Adequate space for the building of docks and piers; capable of loading and unloading steamships; storage facilities and railroad facilities within reach of the piers; depth of water, and possibility of reaching depth of water in the channel and in the slips; contiguity

to labor market to supply necessary labor for the loading and unloading of ships; local transportation facilities.

217 Q. That is six main items. Are they all of the same relative importance, in your opinion, or some of more importance than others?

A. I think some are of more importance than others.

Q. Will you indicate to me, if you please, the relative importance of those items?

A. I think the most important of all is the property shall be of sufficient size to permit the building of docks capable of berthing and permitting the loading and unloading of steamships.

Q. And can you approximate those things, in percentage of 100, for instance?

A. I am afraid I can't do that.

Q. You consider that of primary importance?

A. Yes, sir.

Q. If that is lacking the others don't amount to anything; would you go as far as to say that?

A. I think that is the principal item in this port.

Q. In this port?

A. Yes, sir.

Q. What do you consider second in importance?

A. I consider the second matter that there should be a possibility of making a sufficient depth of water in the berths, to the side, and in the slips.

Q. And the third one?

A. The third, I think the question of the labor market would come third.

Q. Fourth?

A. The question of storage facilities.

Q. Then the last one? I said six; there are five?

A. Yes. Local transportation facilities.

Q. Every one of those things that the Langley property has here but the last is found almost as well in Staten Island, across the bay?

A. No.

Q. Haven't they got adequate space?

A. They have adequate space.

Q. But they haven't the depth of water?

A. Yes, sir.

218 Q. Haven't they got a labor market?

A. No.

Q. Don't you know there are four or five very large shipbuilding yards and things of that sort in Staten Island?

A. Yes; I know that.

Q. Don't you think that is enough of a labor market?

A. No.

Q. What do you mean by a contiguity to labor market?

A. I mean there must be sufficient labor to load and unload ships; that is, stevedores. They haven't got them in Staten Island, and

haven't got even sufficient shipbuilding labor down there, and the result is that stevedoring operations down there are at an expense greater than in Jersey City or Brooklyn.

Q. The reason for the lack is that stevedores are more or less transient labor and follow the docks, where there is chance of picking up an odd day's work, is that true?

A. No.

Q. Do you know anything about the stevedoring business?

A. Yes, sir.

Q. How?

A. How?

Q. Have you ever been interested in it?

A. Always interested in everything relating to the waterfront.

Q. Did you ever have any relation to any stevedoring firm?

A. No.

Q. Did you ever have any contract with any firm for stevedoring or longshore work?

A. No.

Q. Then on what do you base this information of yours?

A. With men I have talked to, and when the city of New York leased the Staten Island piers all of the lessees objected to going there on account of the fact that there was no labor market down there.

Q. When was that?

A. That was in 1918.

219 Q. There was not a large labor market anywhere in 1918, was there?

A. But there was less there than anywhere else.

Q. Just answer the question. There was not a large labor market anywhere in 1918?

A. Yes, sir.

Q. Don't you know the Government was recruiting stevedore regiments?

A. Yes, sir; but they were unloading ships in the harbor.

Q. Many commercial ships?

A. What do you mean by commercial ships?

Q. Ships carrying freight for commerce?

A. There were some.

Q. I am excluding, of course, governmental functions.

A. Certainly; there were ships besides those.

Q. Many?

A. I don't know what you call many. There were some.

Q. What do you call them?

A. I would not specify by numbers, but I know they were shipping good to Australia and South America and South Africa; they were not within the war zone.

Q. You do not think there were enough foreign shipments between those ports to keep the harbor of New York busy, do you?

A. Not alone.

Q. You don't think the stevedores of New York would be kept busy?

A. What about the steamers for Norway and Sweden and the Baltic ports?

Q. You say you talked——

A. You asked me how I know about stevedoring. I have talked with them about it and made it part of my business to know about the labor market.

Q. In 1918?

A. In 1918 and subsequent to that time.

Q. Don't you think it was just as hard to get stevedores in Brooklyn and New York, comparatively, as anywhere else?

A. It was not as hard as on Staten Island. To go down
220 there they had to pay their traveling expenses and traveling time in addition to the regular pay.

Q. You have to do that any time when you take a man away from his regular place of employment?

A. You don't at Brooklyn.

Q. How many miles of piers are there at Staten Island?

A. What do you mean by miles?

Q. You are talking about miles of water front, that there are piers on. I want to know how many miles of piers you say there are on Staten Island?

A. There are at the present time?

Q. Yes. There were in 1918; tell me that.

A. How many miles of piers?

The COURT. Using the same way you described the New York water front, how many miles of water front on Staten Island which is characterized as having piers.

The WITNESS. There are not any that I know of except—I beg your pardon—except the Pouch Terminal and the American Dock. Four for the Pouch Terminal and three for the American Dock. That is seven, all told.

Q. That is all the piers there are on Staten Island?

A. Wait a minute. You mean commercial piers? Not piers used for shipbuilding piers and railroad piers?

Q. Piers where they unload and load?

A. Yes; just those.

Q. Just seven?

A. Yes.

Q. Just seven miles of water front have piers on them in the island of Manhattan?

A. On the island of Manhattan the water front is improved from—over, about, I should say, six miles.

Q. You mean only steamship piers, or ferry slips and everything?

A. Including everything.

221 Q. How many miles of them are taken up by railroad piers?

A. They use stevedores on railroad piers.

Q. They don't use them at ferry slips?

A. That is a very small percentage.

Q. How small?

A. On the North River there are probably half a dozen ferries, which take up about a thousand feet or 1,500 feet of the six miles.

Q. How many miles of water front in Brooklyn are there that are improved by piers?

A. I could not tell you that without measuring them.

Q. Don't you know stevedoring labor follows the number of piers?

A. I know Brooklyn is a very good labor market, and the same is true of Jersey City, but Staten Island is not.

Q. Is Manhattan?

A. Manhattan, yes.

Q. You know, Mr. Farley, don't you, that labor is never found in settlements and places where there is not anything for it to do?

A. It requires more than that; it requires houses for them to live in, and they haven't those in Staten Island.

Q. Don't you know, as a matter of fact, you don't, for instance, find a group of steel workers quartered in a place where no steel work is done? That is always true?

A. Yes, sir.

Q. In your experience in these different maritime endeavors do you think labor follows the factory, or the factory the labor?

A. It is a question whether they will go to Staten Island to live.

Q. Do you know anything about factories built in New York in the last fifteen or twenty years that have been placed to accommodate the labor market?

A. They have been placed near a labor market.

Q. Staten Island is near a labor market, isn't it?

A. What labor market?

222 Q. Near Manhattan?

A. It is five miles away from Manhattan.

Q. Isn't that near?

A. No.

Q. How near do you think to the foot of Fifty-ninth Street, Brooklyn, the labor market is?

A. In the vicinity—the principal labor market in Brooklyn would be in about in the vicinity of the New York Dock and Bush Stores, which is not very far from this location.

Q. You think that is where most of the stevedores and longshoremen come from?

A. Yes, I think so.

Q. Don't you know most of those people live around Union Street?

A. Red Hook.

Q. Do you call that near?

A. I think so.

Q. How many miles would you say it was?

A. From where?

Q. From the foot of Fifty-ninth Street up to Union Street and the surrounding streets, Brooklyn?

A. A couple of miles.

Q. How many?

A. Two, maybe.

Q. More than that, isn't it?

A. I cannot say about that. I do not know whether Union Street is the center of the stevedoring market or not. You say it is.

Q. Where do you say it is?

A. I don't know. I only know Brooklyn has the reputation of being a good labor market. That information I got from stevedores who were engaged in business for a great many years.

Q. Now, you say that this contiguity to a labor market is one of the things Staten Island hasn't got that Brooklyn has? Is there anything else?

A. It has not got ample local transportation facilities. They are dependent upon the Staten Island ferry as the only way of getting there except the Port Richmond Ferry to Jersey City.

223 Q. If the people that were employed in Staten Island lived on Staten Island they would not depend on the ferry, would they?

A. They would have to get aeroplanes if they did not.

Q. If they lived on Staten Island?

A. And worked elsewhere?

Q. And worked on the piers you and I are putting there?

A. You mean the laborers?

Q. Yes.

A. It is a question whether you can get them to go there.

Q. It is a question anything you build whether anything is going to happen?

A. Will you permit me to read this extract from the report of the chamber of commerce with regard to Staten Island?

Q. Is that where you have been taking this——

A. No, but it sustains my contention in regard to it.

Q. Does that confirm you in your opinion?

A. Yes. It says: "The main argument in favor of Staten Island is adequate ground space, but it has none of the other requirements as a war base."

Q. Did the chamber of commerce fix the same elements of value that you did?

A. Practically the same.

Q. Did you take it from their report?

A. No.

Q. When did you read their report first?

A. I read it when they first selected the Langley property for the Army base.

Q. When was that?

A. That was the spring of 1918.

Q. And when did you make up your mind that those five things represented the elements of value of water-front property?

A. I have always thought so.

224 Q. Have you paid any attention to sales in the neighborhood as determining its value?

A. Yes, sir.

Q. Do you think that those affect the measure of value ordinarily?

A. I think it is a consideration.

Q. How much of a consideration?

A. That all depends upon how authentic the sale is, and what the surrounding circumstances are.

Q. The sales discussed here, have you doubts as to the authenticity of those?

A. What sales?

Q. The one your predecessors spoke of?

A. I think the Lotus sale is authentic because I was familiar with it when it was made.

Q. You don't think it is authentic?

A. I think I was familiar with it when it was made.

Q. Do you think it was a fair measure of value at that time?

The COURT. The one to the Lotus Realty Company?

The WITNESS. The one by the Lotus Realty Company to the city of New York. He asked me what sale I though were authentic, and I said the sale of the Lotus Realty Company to the city was authentic, because I knew something about it.

Q. Do you think the one to the Lotus Realty Company was not?

A. I didn't say that.

Q. I am asking you, do you?

A. I do not know anything about that except what the record shows. And I agree with my predecessors in saying the assembling of those two pieces of lands enhanced the value of the property. There is another element. The people who owned the two parcels might not have known the city of New York desired to purchase the property, and the Lotus Realty Company, in selling the

225 property to the city at the price they were willing to pay, was taking advantage of that.

Q. There was quite a furore about that?

A. Not then, afterwards; some years after.

Q. Quite some criticism of the price?

A. Yes, sir.

Q. The same criticism was because of the fact it apparently bore evidence of inflation?

A. I think the argument was principally between Mayor Gaynor and the Cuttings.

Q. You don't think there was anything to the fact the property had jumped from 70 cents to $1.10 in one year shows undue inflation?

A. It was passed upon by half a dozen inquiries.

Q. (Question repeated by the stenographer.)

A. I think that the price paid was a proper price to pay under the circumstances.

Q. That is not an answer?

Mr. BUCHNER. I move to strike that out.

The COURT. Motion granted. Strike it out.

(Question repeated by the stenographer.)

The COURT. Do you think the transaction, such a transaction as that, showed any undue inflation? Can you answer that yes or no?

The WITNESS. I will have to answer it, saying I do not know whether it was or not.

Q. When you looked at this Langley property with a view to testifying here——

A. When I looked at it?

The COURT. First?

The WITNESS. I was only engaged in this proceeding after the first of January.

226 Q. This year?

A. Yes, sir.

Q. And at that time the entire improvements of the Government had been completed?

A. Yes, sir.

Q. When had you seen the Langley property previous to that?

A. I saw it from time to time for—extending from 1908 to the time the Government took it over.

Q. When you say "from time to time," tell us what you mean by that?

A. Maybe once a year.

Q. Did you see it every year between 1908 and 1918?

A. I think so.

Q. Did you examine it?

A. I looked at it.

Q. What do you mean by looking at it; you passed it?

A. I mean I got out and looked at it. We had some permittees of the dock department down there and it was part of my business to look them over.

Q. At the Langley property?

A. At the adjoining city property.

Q. And it was in looking at those people on the city property that you just saw the Langley property?

A. Yes.

Q. When before April, 1918, was the last time you were down there?

A. I could not tell you that. I could not tell you exactly.

Q. Approximately, will do me?

A. I should say it was a year previous, two years; maybe six months.

Q. A year or two?

A. A year or two.

Q. Do you feel that location in Brooklyn can be judged on the same basis as a location in Manhattan if they both be water-front properties?

A. You mean in regard to values?

Q. Yes.

A. It depends on what you want to use it for.

227 Q. What property around New York have you had any direct personal contact with that is so like the Langley property that you feel it can be used as a fair criterion of value?

A. There is no property around New York similar to the Langley property.

Q. Don't you think that the Langley property is rather unique?

A. Yes.

Q. It is a sort of thing that has to be valued by itself?

A. I think it is property that can be valued by itself based upon the earnings and leases of somewhat similar property.

Q. And sales?

A. And sales, if there are any.

Q. You can't use a lease of improved property as a fair measure of value of virgin, unimproved property?

A. Of improved property as virgin unimproved property? No. The leases I refer to are not improved property. One of them is partially improved and the other totally unimproved.

Q. How close to 1918 were those leases?

A. Made in 1918.

Q. Are they alongside the Langley property?

A. No.

Q. How far away?

A. In Twenty-seventh and Twenty-eighth Streets.

Q. A considerable distance, isn't it?

A. Yes.

Q. About a mile and a half?

A. About a mile and a half; yes.

Q. Well, then, in your opinion as to the value which you have given, you have, as I understand it, predicated your ideas of property value solely upon the physical appearance of the Langley property if it complies with those five elements of value you have spoken of, isn't that so?

A. No; that is not so.

Q. What else have you taken into consideration?

228 A. I have taken into consideration how the Langley property should be improved and what the rental value would be when improved, based on rental values of somewhat similar properties throughout the port.

Q. Let me ask you another question: When the dock department takes a plan of improvement and adopts it, is it rather binding on the owners of water-front property?

Mr. RIGGS. Objected to, calls for a conclusion of law upon the part of the witness.

(Question withdrawn.)

Q. When the dock department adopts the dock plan covering certain property, has that any effect on the value?

A. You mean—that is, what I understand you to mean is, when the dock department imposes a plan upon private property, does it have any effect on the value of the private property?

Q. Yes?

A. Yes.

Q. To what extent?

A. It lessens the value of it.

Q. Was there a plan on April 6th, 1918, for the property from Fifty-eighth to Sixty-third Streets?

A. There was a plan about that time; I am not sure the year; 1906, 1907, or 1908.

Q. On April 6th, 1918?

A. There might have been one about that time, otherwise they could not have introduced condemnation proceedings. You said April, 1906?

The COURT. April 6th, 1918.

Q. I said April 6th?

A. Oh, no.

Q. Sure about that?

A. I am quite sure about it.

Q. Was there any plan in April, 1918?

A. Plan of what?

229 Q. For the improvement of the Langley property?

A. New plan for the improvement of the water front?

Q. Yes.

A. I understand not.

Q. Did you ever see this before you left the dock department [handing a paper to the witness]?

A. Yes.

Q. That is a plan for the improvement of the property including this Langley property in South Brooklyn?

A. Yes.

Q. How many piers could you put on the Langley property under that plan?

A. I would like to explain what that plan is.

Mr. RIGGS. That is a plan adopted on its face April 13th, 1918, by the commissioners of the sinking fund seven days subsequent to taking.

The COURT. If you are going to ask the witness what the plan itself shows, the plan must be put in evidence.

Mr. BUCHNER. I am going to ask him if, under that plan, his measure of value would be changed.

Mr. RIGGS. I object to any plan adopted on its face by the commissioners of the sinking fund after the date of the appropriation.

The COURT. Objection overruled. The question will be allowed in this form.

Mr. RIGGS. Exception.

Q. How many piers were you going to put on the Langley property?

A. I was going to put three piers.

Q. On all the property together?

A. Yes; one pier on the north parcel and two on the south parcels.

230 Q. How big was the north?

A. 1,406 feet long and 100 feet wide.

Q. Where were you going to put it?

A. I was going to put it 101 7/10 feet south of the pier on the north.

Q. One hundred and how many feet?

A. 101.

Q. That was over the Kenyon line?

A. I don't think so.

Q. Isn't that the Kenyon line 107 feet?

A. It is by the map, but only 105 according to this.

Q. Even the 105 you would be over the Kenyon line?

A. Make it 107 feet south of the Kenyon—107 feet south of the southerly side of the Kenyon.

Q. And how wide?

A. 100 feet wide.

Mr. RIGGS. Mr. Farley, did you say 101 7/10 feet south of the Kenyon pier, or the Kenyon line?

The WITNESS. Kenyon line.

Q. You said south of the Kenyon pier?

A. I made a mistake.

Q. Well, now, if the city of New York had started a pier on this part of its property due south of that small parcel before you people had built your pier, you never could have built it, could you, in there?

A. Why should the city of New York do such a foolish thing as that?

Q. Because they have this plan adopted on the 13th of April—

Mr. RIGGS. I object to any further questions on a plan for the improvement of the property adopted subsequent to the appropriation by the United States.

Mr. BUCHNER. He said why should the city do such a foolish

231 thing as to build a pier there, and I told him seven days later the city adopted——

The WITNESS. No, no, no. That was the War Department plan, after the title vested in the War Department.

Q. Was there anything at that time to prevent the city from building this pier?

A. After what time? After it vested in the War Department?

Q. Before that they could not, neither could you?

A. Prior to that there was nothing in existence.

Q. Prior to that?
A. There was nothing in prevent them?
Q. Yes; from running out on the northerly side?
A. Why should there be?
Q. Nothing to prevent them putting a pier there?
A. Yes, surely; common sense.
Q. Does the city always use common sense in its dock department?
A. They have not since I was out.
Q. Since you have been out?
A. They have done some foolish things since I have been out.
Q. Where were you going to put your two piers on the other property?
A. I was going to put one pier on the northerly side 92 feet from the southerly line of the city property.
Q. How wide were you going to have it?
A. One hundred feet.
Q. Wide. Then where were you going to put the other?
A. One hundred and twenty-six feet north of the southerly line of the Langley property.
Q. One hundred and twenty-six feet north?
A. Yes.
Q. How much fairway were you going to have between the
232 piers? How wide were you going to have the pier?
A. The slip room would have been 250 feet.
Q. How wide was the pier going to be?
A. One hundred foot.
Q. That is north of this side [indicating on map]?
A. Here [indicating].
Q. You were going to have one pier 126 feet from there running over 100 feet, that would be 226 feet. And how much fairway?
A. Two hundred and fifty feet.
Q. That is 476 feet?
A. And then 100 foot wide and 92 feet——
Q. That is 576. And 92 is 668?
A. Yes, sir.
Mr. BUCHNER. Are these figures correct, Mr. Riggs? By our figures there is only 637 in this.
Mr. RIGGS. Six hundred and sixty-eight feet, from there to there [indicating on plaintiff's Exhibit L]. The reason for that is that line only goes to the middle of Sixty-third Street, instead of the south side of Sixty-third Street, as it should. That is 30 feet additional. The correct map is here [plaintiff's Exhibit L].
Q. That is practically the number of docks the Government put on it?
A. The Government put 3½.
Q. They had to take the middle strip in?
A. They had the whole layout to build their piers, I believe three piers, and one half pier along the southerly side.
Mr. RIGGS. How wide were the piers they built?

The WITNESS. One hundred and fifty feet.

233 Q. What were you going to put behind your piers?

A. You mean in the upland?

Q. Yes.

A. You could have put warehouses.

Q. How many of them?

A. Between Sixty-second Street and Sixty-third Street you could have put one warehouse 310 feet by 200 feet; between Sixty-second and Sixty-first Streets one warehouse 310 feet by 200 feet; between Sixtieth Street and Sixty-first Street you could have put one warehouse 310 feet by 88 feet; and on the north parcel two warehouses, each 310 feet by 100 feet.

Q. Then you think that this property would have been worth more if all together?

A. Sure.

Q. No question about that in your mind?

A. No, sir.

By the COURT:

Q. Do you think each plot was big enough itself to be capable of development to the greatest advantage without having any additional property?

A. It would be better if the two parcels were together and not separated by the city ownership. We had a bill prepared to allow the exchange to be made, but it never was accomplished owing to the fact of the Government taking it over.

By Mr. BUCHNER:

Q. Was the Langley Estate willing to trade it in?

A. Yes; at least, I think so. The city authorities were willing to do it.

Q. Do you think that unimproved property like this is worth more for just land value than property which has improvements on it?

A. Property like this?

234 Q. Unimproved, is worth more than property which has been developed? The land value of it?

A. Yes.

Q. Just the land value of it?

A. Yes.

Q. You think that is worth more?

A. Yes, sir.

Q. You don't think that having done the work of dredging and all that sort of thing on it, that the land under water is any more valuable?

A. I don't think I understand that question.

Q. If, instead of being the way this is, the basin had been dredged out so as to have 35 or 40 feet of water to the bulkhead line, that land would not have been worth as much as it is now?

A. You mean the United States bulkhead line? You mean this line out here [indicating]?

Q. High-water mark is the term I should have used?

A. If it had been dredged out, it would have been worth more. You save the cost of the dredging.

Q. Isn't that true, that any of these improvements that had been done, it would have made that laid worth more than the raw state it was in?

A. I don't understand what you mean by that?

Q. Take any of these other strips that have been developed. Do you think the land itself was worth more or less after the improvements were put on it, the dredging and bulkheads and all that sort of thing?

A. You will have to tell me what piece of property you mean.

Q. Take the one the B. R. T. filled in. Was that worth more or less?

A. To the B. R. T., more.

Q. It was too small for steamship use?

A. That filling in is comparatively small, because the buildings make it valuable. They have a power house on it.

235 Q. I am not talking about the value of the buildings. The land. Is there a power house on it?

A. Yes, sir.

Q. Where is it located?

A. At the inshore end of it.

Q. You mean at the First Avenue end or at the high-water mark?

A. At the First Avenue end.

Q. Haven't you mixed Sixty-third and Sixty-ninth Streets?

A. I mean the little B. R. T. property—I thought you meant between Fifty-second and Fifty-third Streets [indicating plaintiff's Exhibit L].

Q. I am talking about the one alongside of the Langley property.

A. Whether that will be worth more or less filled or unfilled?

Q. Whether that will be worth more after filled in than before?

A. I don't think that would affect the situation unless you wanted to have it dredged out. But filling in costs practically nothing.

Q. Dredging out any of this channel there, this fairway, would that tend to improve or depreciate the value of the property?

A. Dredging?

Q. Yes.

A. I don't think dredging ever decreases the value of the property unless you want to fill it in.

Q. You don't think it improves the value?

A. I don't think dredging decreases the value.

Q. Does it improve it?

A. Ordinarily, I should say so.

Q. As a matter of fact, does it make a material difference in the value of these things, how much water there is, the more water the more valuable the strip would be?

A. Unless you want to fill it in.

Q. What I am trying to find out is this: One of these gentlemen said that a basin dredged out like the Morse was not worth
236 as much as this Langley property in its raw, uncultivated state. Do you think that is true?

Mr. Riggs. Who said that?

A. I don't think I heard that answer.

Q. Do you think that is true?

(The question was repeated by the stenographer.)

A. Well, you mean the Morse property between Fifty-fifth and Fifty-seventh Streets, do you? You mean if the entire two blocks were dredged out?

Q. What I asked was this: I want to find out if you say that the Langley property as it stood in 1908, vacant and unimproved, was worth more or less than it would have been if there had been some dredging there so as to make a basin of about 25 or 30 feet in depth?

A. If there was dredging you would have saved the cost of the dredging.

Q. Would it improve the value of the property?

A. Yes, to that extent, the amount of dredging that had been done.

Q. Isn't it true that in your judgment as to this value what you have done is taken a comprehensive view of New York Bay as you know it, and added to that your particular experience in this place, including Hoboken, Jersey City, Manhattan, Greenpoint—all those other water fronts—and from having looked at the physical appearance of this Langley property you have deduced what you think is the fair and reasonable value of that plot as a whole? Isn't that the way you fixed its value?

A. I told you how I did it. I examined the rental values in the different parts of the harbor, capitalized that value, and
237 deducted the cost of improving and it gave the total naked land value, and that I divided by the area which was given to me, and it comes out about $2.25.

Q. Did you, in making this figure, have in mind the physical appearance of this property in 1918?

A. I did; yes, sir.

Q. Where did you get that information?

A. Physical?

Q. Yes.

A. In 1918?

Q. Yes.

A. From my examination and knowledge of the property, and also from maps.

Q. Mostly from maps?

A. Well, you can——

Q. You had not seen it before a year or two previous to that?

A. I knew just what it was.

Q. It was a sand beach, wasn't it; regular beach?

A. Yes, regular beach.

Q. How far around the city of New York did you add up those rental values that you talk of? Did you take them from Manhattan?

A. I took them of the Manhattan, and on the Jersey shore and on the Brooklyn shore, and what the Bush Terminal were charging, and what the New York Dock Company was getting, and even took into consideration what they were getting down in Staten Island.

Q. What did you do with those figures?

A. I learned the value of a berthing space about 400 feet long would be $200 a day, and made that even more liberal by making it $150 a berth.

Q. After you got all those figures from these different places, did you strike an average, or what did you do with them?

A. Struck an average. Not an average altogether, but I took the lowest price, and took that as a unit.

Q. Where was that?

A. That was—I should say, in Brooklyn.

238 Q. Where?

A. At the Kerr pier.

Q. That was the very nearest pier to this particular property, wasn't it?

A. Yes.

Q. And that was what you used as the measure of value?

A. Yes, sir.

Q. Did the cost of construction increase any in the year 1917 and 1918?

A. Did the cost increase?

Q. Yes.

A. Yes, sir.

Q. About how much did the material and labor that was used in water-front property increase between 1916 and 1917?

A. I can not go into those details. I got those—I got my figures on the cost of construction from the Henry Steers Company, which is the largest company of its kind on the Atlantic coast.

Q. You do not know what basis that is on?

A. No, sir. And also the estimate of the chief engineer of the dock department.

Q. When did you get those estimates?

A. I got the estimates about six weeks ago.

Q. When did you ask them for them?

A. I asked them for them about two weeks after the first of January, shortly after I was retained in this proceeding.

Q. And then you asked those two men to give you the approximate cost of building these three piers and the warehouses you have described.

A. I did not go into the warehouse question until afterwards. I went into the piers and sheds.

Q. You just asked them for the prospective cost of building these piers?

A. In April, 1918.

Q. Did you tell them April, 1918?

A. I did; yes, sir.

(Adjournment until May 12th, 1920, at 10 o'clock a. m.)

239 TRIAL RESUMED.

CHARLES J. FARLEY, resumed:

Cross-examination by Mr. BUCHNER (continued):

Q. I think yesterday, Mr. Farley, that you said that you figured out the value of this property by two different ways; is that so?

A. Yes, sir.

Q. One of them, if I understood correctly, was it was worth $2.25 a square foot?

A. Yes, sir.

Q. And the other one was upon taking what you thought was the cost of construction, figuring the amount of revenue that should be derived from that property improved, and then deducting the cost of improvements from the property, leaving the value of the land?

A. That is not exactly so. I took the rentals derived from somewhat similar property in the port of New York, and capitalized that amount, deducted from the cost of construction, and divided it by the area of square feet.

Q. And I understood you to say that there was a considerable divergence in value between those two; is that so?

A. No, sir; the comparison method, that is, comparison with other leases of water-front property in that vicinity, would indicate the value to be about $2.25. According to the other method, it came out $2.33, so I took the lower sum.

Q. That is a difference of about 8 cents a square foot on about 1,700,000 square feet?

A. Yes, sir.

Q. A lot of money, isn't it?

A. I thought it was rather close. That is not much of a difference, 8 cents.

Q. Then you purely arbitrarily disregard you second figure?

A. No; I thought one confirmed the other.

240 Q. Your opinion of it is that a difference of 8 cents a square foot in the measure of value there is something that is not to be considered, it is so slight as to be disregarded?

A. I would not say that. It is customary in valuing water-front property to take a round figure, anyhow, leaving out the odd cents.

Q. Those capitalized figures you arrived at—where did you get those?

A. The capitalization figures?

Q. Yes.

The COURT. By that you mean the properties that Mr. Farley has referred to as somewhat similar, New York water-front property. You took somewhat similar water-front property?

The WITNESS. In the port of New York.

Mr. BUCHNER. I will withdraw that and ask it again so that I will be understood.

Q. What I mean by that is: On what measure of return did you arrive at this figure of capitalization?

A. 11¼ per cent.

Q. And in figuring 11¼ per cent you mean gross return, don't you?

A. Yes; 11¼ per cent—capitalization of the income at 11¼ per cent would give you the total gross value as improved, and then taking from that the cost of improvement would give you the naked land value as it existed.

Q. I don't quite follow that. Do you mean that you figured that the capitalization was 11¼ times the annual income or that the gross annual income represented 11¼ per cent of the capitalization?

A. Perhaps if I gave you the exact figures——

Q. I just want to know your theory first.

241 A. I took the rental value of similar wharf property in the port of New York and capitalized that annual rental value at 11¼ per cent.

Q. You mean by that that the annual rental value in your figures represented 11¼ per cent on the capitalization?

A. Yes.

Q. So that the gross revenue—gross revenue to whom?

A. That was the amount which could have been collected from the piers when built by the owner.

Q. That was the gross revenue to the owner?

A. Not gross to the owner, because I allowed two per cent, for taxes.

Q. Besides that?

A. That was included in the 11¼ per cent.

Q. That is gross, isn't it, Mr. Farley?

A. My 11¼ per cent included 7 per cent interest——

Q. Wait a minute. You understand the difference between gross and net income, don't you?

A. Yes.

Q. Eleven and one-fourth per cent of the capitalization of any of these piers you figure is the gross income from them, is that so?

A. Yes.

Q. And that the gross income from any of these properties is 11¼ per cent of the capitalization of the improved property; is that right?

A. If I understand the question, yes.

Q. Is there anything about the question you don't understand?

A. I think I would rather prefer to explain it in my own way, if you will let me.

Q. I would prefer if it is possible to get what I think is the foundation before we get down to specific things. If you don't understand it, if you will tell me what part of it you don't understand, I will try and explain it.

A. The 11¼ per cent represents—is the percentage at which I 242 capitalized the income from the pier, that is the income to the

owner, the net income to the owner. That 11¼ per cent includes taxes and interest and maintenance and repairs.

Q. What you did then, if I understand you correctly, is, you worked out what you thought was the gross income derived for this property as improved—that was your first step?

A. The gross income to the owner.

Q. From this property as improved?

A. Yes, sir.

Q. Then you took that as representing 11¼ per cent of the actual value of the improved property, is that so?

A. No, sir.

Q. What did it represent?

A. The total value of the property as improved—the income derived from the owner would be 11¼ per cent of the property as improved.

Q. Isn't that what I said?

A. I do not know. I did not understand it that way.

Q. Let us see if we can follow your calculations. Your first step was to work out what you thought was the gross revenue received by the owner, let us put it that way, from this property?

A. Yes, sir.

Q. And that gross revenue represented in your mind 11¼ per cent of the total value of the improved property; is that so?

A. Yes, sir.

Q. So far we agree?

A. Yes, sir.

The COURT. What do you mean by this property?

Mr. BUCHNER. The property he is figuring on.

The WITNESS. That is the Langley property.

243 The COURT. But there was no revenue from the Langley property?

The WITNESS. The revenue that would have been derived based on rentals on similar property in the port.

The COURT. You had in mind some piece of property in the port you considered fairly similar to the Langley property?

The WITNESS. Not one particular piece; I considered a dozen different pieces.

Q. At the time you made these calculations, Mr. Farley, what you did have in mind was the Langley property as constructed in your imagination with the improvements you thought should be put upon it?

A. Yes, sir.

Q. Having gotten what you thought was the value of this Langley property improved according to your ideas of it, you deducted from that what you thought was the cost of the construction of the improvements?

A. What these engineers gave me as the cost of the improvements.

Q. Where did you get these figures of cost of improvement?

A. From the chief engineer of the department of docks, and from Mr. Henry Steers, who is the head of the largest docking concern on the Atlantic coast.

Q. You got these figures in 1920?

A. I got those figures in 1920 as of 1918.

Q. What basis did you give them to figure out the cost of this construction?

A. I gave them the date of the piers and the latter data of the warehouses.

Q. Did you get the cost of construction of the warehouses from the same people?

A. I got the cost of construction from the Henry Steers
244 Company, not from the chief engineer of the dock department, who is not familiar with them.

Q. Does your plan that you showed me yesterday show the different warehouses that you had?

A. Yes, sir.

Q. You had plotted those all out?

A. Yes, sir .

Q. Is the end of that larger Langley tract, the north side?

A. That is the north side.

Q. Now, the larger plot, the plot above it. The southerly plot, but the northerly line of that is how far from the south side of Sixtieth Street?

A. One hundred and eleven feet eleven inches.

Q. And how far inside of that boundary line were you to place your first pier?

A. Ninety-two feet one inch. It is here on the map.

The COURT. Indicate that on the larger map, Mr. Farley, with the pointer, please.

The WITNESS. That is this point here, that is 111 feet 11 inches south of Sixtieth Street [indicating], south of the southerly line of Sixtieth Street.

The COURT. Right on First Avenue?

The WITNESS. Right on First Avenue; yes, sir.

Q. How far inside of the northern boundary of the larger Langley plot were you to lay your first pier?

A. Ninety-two feet one inch.

Q. You told these men all that?

A. Yes, sir.

Q. You told them that after this time it had all been done down there by the Government?

A. Yes, sir.

Q. After the property had all been improved?

A. Yes, sir.

Q. What other details did you give them in making out these plans?

A. I gave them no other details.

245 Q. That was all?

A. They were familiar with the depth of water there, so it was not necessary to give them figures on that.

Q. You took that for granted?

A. I did not take that for granted. I knew it, because Mr. Trout, who was associated with Henry Steers, had charge of the dredging operations for the Government.

Q. Did you get these figures from Mr. Trout?

A. Which figures.

Q. The cost of construction?

A. The cost of construction came from Mr. Trout.

Q. He was here as a witness in this case. Did you hear him asked anything about the cost of construction?

A. I do not believe that I did.

Q. Do you yourself know anything about the measure of the value for these improvements; the cost of construction?

A. No.

Q. Did you know anything about any portion of the cost of construction?

A. No, sir.

Q. So that your measure of the value of this property is all based upon what these other two men told you?

A. Yes, sir.

Mr. BUCHNER. If your honor please, I move to strike out the testimony of Mr. Farley as to this portion of it.

The COURT. Decision reserved until the conclusion of the testimony. [To Mr. Riggs:] Unless you convince me that it should stand I will strike it from the record.

Q. Let us get to your other method of computation, Mr. Farley. Do you consider $2.25 was the square-foot value of that property in April, 1918?

A. Yes, sir.

246 Q. Quite positive about that?

A. Yes, sir.

Q. And upon what theory did you arrive at that result?

(Witness examines papers.)

Q. No, upon what theory now, I am asking you?

A. Upon the theory that transactions in water-front property upon the South Brooklyn shore, including sales and leases, showed that to be the correct amount.

Q. Well, now, these aggregate figures that you talk about in the harbor of New York. Over how much of an area of the harbor did you take those into consideration?

A. Why, I took the figures on the Jersey shore, on the Greenpoint, Brooklyn, Staten Island, and Manhattan. I went all over the port and ascertained the figures received for similar property for steamship purposes.

Q. Well, now, you say similar property?

A. That is, somewhat similar property—property suitable for steamship purposes.

Q. There was not anything quite the same as this Langley property around the port at that time?
A. As the Langley property was?
Q. As you visualize it improved?
A. No, I don't think there was anything quite as good as that around the port.
Q. You think that was the best thing there was?
A. I think so.
Q. For what period of time do you figure these leases?
A. I took the leases that were in existence at that time.
Q. You mean the leases that were then in existence, no matter when they had been made, is that true?
A. I mean the leases that had been made about that time.
247 Q. About how many leases did you find had been made about that time in Jersey?
A. In Jersey?
Q. Yes, sir.
A. I don't think—I did not say I predicated my estimate on Jersey leases. I said transactions on the south—water-front property on the South Brooklyn shore.
Q. If I understand this, do I understand you correctly, that you did predicate this value upon leases made in Jersey, Staten Island, Greenpoint, Brooklyn, and Manhattan?
A. On rentals received from piers in Jersey——
Q. On rental of piers in Jersey?
A. On rentals, but not on leases on piers.
Q. You took into consideration, you say, rentals on piers in Jersey, Mr. Farley?
A. Yes, sir.
Q. How many rentals? How many piers?
A. Three.
Q. And how long ago were those contracts, or leases, or whatever it is covering them, made?
A. They were made in 1918.
Q. What part of 1918?
A. All through 1918.
Q. Over that whole year?
A. Yes.
Q. Any of them before April?
A. Yes, sir.
Q. How many?
A. Well, I don't know; I can't tell that.
Q. I am talking about these three particular ones.
A. Yes.
Q. Were they rentals, as you call them, or leases?
A. They were rentals.
Q. Not leases?
A. Not leases.

Q. Now, in the Greenpoint section, how many rentals did you take into consideration there?

A. One.

Q. When was that made?

A. That was—the charge made during the entire year, the rental collected during the entire year.

248 Q. What you mean when you say rentals, then, is that you took the gross revenue on your piers, isn't that so?

A. Yes.

Q. I see. During 1918?

A. Yes.

Q. Did you prorate the year at all, divide it up into months, or anything of that sort?

A. No, sir.

Q. Now, South Brooklyn; how many rentals did you take into consideration there?

A. I took into consideration the rental at the Kerr pier, the Kenyon pier, the pier at Thirty-fifth Street, Brooklyn, and the pier at Thirty-third Street, Brooklyn—you are talking about rentals now?

Q. I am talking about what you took into consideration, in fixing the income from the piers—the piers with the revenues?

A. Yes. The pier at Twenty-ninth Street, Brooklyn, the pier at Thirtieth Street, Brooklyn, the pier at Thirty-first Street, Brooklyn—how many is that, six?

Q. Six, yes. That is how many there were, six?

A. Yes.

Q. Now, in Staten Island how many piers did you take into consideration?

A. There was only one pier that could be used.

Q. Did you use it?

A. Yes, sir.

Q. And Manhattan?

A. Well, two is all I can recall just now.

Q. Two?

A. Yes, sir.

Q. You understand, do you, Mr. Farley, that in the questions I am asking you, I am asking you as to how you arrived at this $2.25 per square foot as a unit of value. Those are the rentals you took into consideration in figuring that, is that so?

A. Yes, that is the $2.33 figure.

Q. I do not want those. I want to know how you arrived

249 at your $2.25 a square foot. What facts did you take into consideration in arriving at that figure?

A. I took into consideration in arriving at that figure the lease at James Shewan & Sons by the Arnott Estate, the lease to the Kerr Steamship Company by the Kenyon Estate, the lease to the Shewan Dry Dock Company by the city, the pier at Thirty-third Street to the Kerr Steamship Company, and I considered also the sale to the

Navy of the Bush property, which, as you say, is not water-front property but very close to it.

Q. Anything else?

A. I can not think of anything else just now.

Q. Let us get some of these dates. The lease to the Shewans from the Arnott Estate. When was that?

A. Lease date the 19th of November, 1918.

Q. Nineteen eighteen?

A. Yes, sir.

Q. Where is the property, please?

A. The property leased between Twenty-seventh and Twenty-eighth Streets.

Q. Is that on the bay?

A. It is on the Gowanus Bay.

Q. Not on the bay that the Langley property fronts on?

A. No.

Q. How close is that to the other Shewan plant?

A. Adjoining.

Q. How much of that is upland?

A. I should say about 225,000 square feet.

Q. Out of how much?

A. Out of 236,315 square feet.

Q. The largest portion of it is upland?

A. Yes, sir.

Q. Is that by any chance a renewal of the lease that was made earlier?

A. No, sir.

Q. That is a new lease?

A. Yes.

Q. That is a new lease?

A. Yes, sir.

250 Q. What was on there before the Shewans, do you know?

A. Yes, sir.

Q. Who was there?

A. The Arnott Estate used it themselves.

Q. For a shipyard?

A. No. They used it for berthing of boats and storing materials. It was not used very much for anything.

Q. Any improvements at all on it?

A. Yes; a house on it.

Q. Was the water-front improved at all?

A. Two pile platforms of piers, narrow platforms, extending out to the pierhead line.

Q. To the pierhead line?

A. Yes, sir.

Q. They were all there before?

A. Yes, sir.

Q. It was leased?

A. Yes, sir.
Q. Before it was leased?
A. Yes, sir.
Q. The lease from the Kenyon to the Kerr Steamship is on a piece of property right down very close to the Langley property?
A. Yes, sir.
Q. When was that made?
A. Dated September 8th, 1916, went into effect early 1917.
Q. That covered what, that pier?
A. Yes, sir.
Q. What else?
A. That is all.
Q. Fifty feet right of way, right across the center of the property?
A. Yes, sir. I have the description of it, if you would like to have it.
Q. No.
A. There was a right of way to be used in common with the Kenyon Estate, fifty feet in width leading from directly in front of the dock to First Avenue.
Q. How much clearance did they have to have on the right of way?
A. Twenty-one feet.
Q. That went into effect in 1917?
A. Yes, sir.
Q. Now, these other leases of the city property to the Shewans. When was that?
A. That was in 1918.
Q. What part?
251 A. I haven't got the date here, but it was negotiated all through 1918. I think the lease was actually signed the latter part of 1918.
Q. And that covered what property, please?
A. That covered property at Twenty-eighth Street, South Brooklyn.
Q. What kind of property?
A. All land under water.
Q. Improved?
A. Unimproved.
Q. All land under water from where?
A. I beg pardon?
Q. You say all land under water?
A. You asked what kind of property. I say it was land under water.
Q. I asked you what property. I mean where is it located?
A. Twenty-eighth Street, Brooklyn.
Q. Where does it start from and where does it end?
A. Within the lines of Twenty-eighth Street, extending from some distance out beyond Second Avenue a distance of 438 feet.
Q. From the bulkhead line of the street out?
A. That is not what I mean.

Q. What do you mean?

A. I mean it extends—commences at a point some distance west of Second Avenue—I can not tell you the exact distance—and extended offshore 438 feet.

Q. The depth is 438 feet. What is the width of it?

A. 23 feet.

Q. That was alongside of this property that the Shewans had leased a little 'arlier from the Arnott estate?

A. Yes, sir.

Q. Right alongside of it; is that so?

A. Yes, sir.

Q. And it filled in the strip that the Shewan Company had gotten from Arnott. It was one of those assembling propositions that we heard about, wasn't it?

252 A. Well, it was property that the Shewans required for the extension of their dry dock.

Q. They had to have it to extend their dry dock?

A. They had to have it if they wanted to extend their dry dock; yes.

Q. Now, this Thirty-third Street pier. Who leased that to the Kerr Steamship Company?

A. The city of New York.

Q. When?

A. December 21st, 1917.

Q. And what property was that? What was the description of it, please?

A. That was the pier at the foot of Thirty-third Street, Borough of Brooklyn, together with the bulkhead 137½ feet north and the bulkhead 137½ feet south.

Q. That was all improved property?

A. That was all improved property.

Q. Those are all the leases that you took into consideration in arriving at this $2.25, is that so?

A. Yes, sir.

Q. And besides that you took into consideration the sale to the Navy of some Bush property?

A. Yes, sir.

Q. When was that sale made, if you please?

A. October 28th, 1918.

Q. That was some time after this other measure of value, wasn't it?

A. At some time after the property was requisitioned by the Government.

Q. Some time after the date as of which you are fixing the value?

A. Yes, sir.

Q. What was the property, please?

A. What was the property?

Q. Yes?

A. Between Twenty-ninth and Thirtieth Street, between Second and Third Avenues.

Q. Whole square block?

A. Yes, sir.

The COURT. Not water front?

The WITNESS. Not water front; it is a block from the water front.

253 Q. How did you figure that property—were Twenty-ninth and Thirtieth Street paved and opened at that time?

A. I could not say positively.

Q. Were Second and Third Avenues opened and paved?

A. Yes; they were opened and paved. I think the o'her two streets were opened and paved, but I am not positive of it.

Q. Will you tell me how a sale—Twenty-ninth to Thirtieth Street—of a whole square block acts as a measure of value in this water-front property?

A. It indicates——

Q. A mile and a half away from it?

A. It indicates values on the South Brooklyn shore.

Q. You think it shows value of water-front property?

A. I think so. It is not exactly water-front property, but it is something like it.

Q. Is it as good?

A. No; I don't think it is.

Q. What possible analogy can you find between property that is bounded by four city streets, a mile and a half north, isn't it—that is, a mile and a half from Twenty-ninth and Thirtieth Streets to Fifty-eighth?

A. About that.

Q. What analogy do you find between this Navy property and the Langley property?

A. Well, I don't suppose there is very much.

Q. I understood you to say you dealt in water-front property?

A. Yes, sir.

Q. You specialize in that?

A. Yes, sir.

Q. You yourself don't think you are an expert as to inland values?

A. No, sir.

Q. Especially Brooklyn property?

A. No, sir.

Q. You don't know a great deal about Brooklyn outside of the water front, do you?

A. No, sir.

254 Q. One of these leases, I understood you to talk about, the city lease to the Shewans, was improved property?

A. Yes, sir.

Q. And it was rented as improved property?

A. Yes, sir.

Q. And in getting from that facts on which to figure the value of this Langley property, did you rely on these figures that you had

otten from other people as to the cost of improving the Langley roperty?

A. No; these leases and the other sales along the Brooklyn shore ere the basis upon which I figured the value of $2.25. The rentals erived from other similar piers in the port were the basis upon hich I figured the value of $2.33.

Q. Let me ask you something. You spoke of sales along the rooklyn water front. You didn't tell me before when I asked you hat items you used to figure out this unit of value about any other les except the Navy sale. I understood that is one of the five things ou had in mind?

A. I said that is five I knew about. The other things I said I erived from brokers and persons who dealt in the property.

Q. Let us take it up in order. You say yourself you are not com-etent to judge the relative value of that property on Twenty-ninth Thirtieth Streets. You don't know what the market value of it now or was then, do you?

A. No, sir.

Q. Then you cannot use that as a basis of figuring value for the angley property?

A. No.

Q. Now, the lease from the Arnott Estate to Shewan of this prop-ty in Twenty-seventh and Twenty-eighth Streets was a lease of proved property?

A. Yes. sir.

Q. Property to the value of the Langley Estate unimproved, didn't the improvements and the cost of them play any part in your calculations?

A. No, sir.

Q. Didn't make a bit of difference?

A. No, sir.

Q. You figured they would have leased it for the same price at they would have given them without improvements?

A. Yes sir.

Q. Now, the Kenyon-Kerr lease?

Mr. RIGGS. Which one?

Q. How many leases are there from the Kenyon to the Kerr eamship Company?

A. One that I know of.

The COURT. What was the date of that?

The WITNESS. Dated 1916.

The COURT. Is that the one you have in mind?

Mr. BUCHNER. Certainly. That is the only one we know about.

The COURT. Very well. We will understand it refers to the lease 1916.

Q. I mean the lease of the property right down close to the ngley property.

A. Yes.

Q. Wasn't it leased as improved property?

A. It was leased as it was, but the lessor agreed to make the im provements.

Q. And the rent was to start when the property was rented an occupied?

A. Yes, sir.

Q. Wasn't that a lease of improved property?

A. Well, yes, it was; but the lease was made whent he propert was not improved.

Q. What difference does it make?

A. Well——

Q. The lease—the rent was not to start until the improvemen were made. Do you think the Kerr Steamship Company would hav paid the same rental for the property unimproved as they did whe the pier was on it?

A. I don't know.

256 Q. You don't know?

A. No.

Q. Is your information on which you have based these calcul tions about the Langley Estate property all as accurate as that?

A. As accurate as what?

Q. That you don't even know whether improved or unimprove the property alongside of it would bring the same rental?

A. That is not what you asked me. You asked me whether Ke would have paid the same price improved or unimproved. I d not know how his mind would have worked.

Q. Kerr is not a man; it is a steamship company?

A. Kerr is the head of the steamship company.

Q. Do you think that property was worth as much improved unimproved?

A. Worth as much improved as unimproved?

Q. Yes.

A. Certainly.

Q. Do you think it was worth any more?

A. Certainly.

Q. Don't you think the improvements on it bore a large propor tion to the rental value of it?

A. I don't understand that.

By the COURT:

Q. Do you think that because of these improvements the rent was higher?

Mr. RIGGS. Higher than what?

The COURT. Than it would have been if there had been no im provements?

A. The unimproved property was worth just as much plus th cost of the improvements, I think.

Q. The rent for the whole property as it was improved? D you think the rent was higher because of the fact that there we

257 were improvements on it than what it would have been if there had no been improvements on it?

A. He considers the pier as part of the improvements.

By Mr. BUCHNER:

Q. Don't you consider a pier an improvement?

A. Yes.

By the COURT:

Q. Do you think the property without the pier erected on it would have brought the same rental as the property with the pier on it?

A. I think so, provided they could have found anybody to build a pier at that time and rent it; yes.

By Mr. BUCHNER:

Q. Do you think anybody would have paid the same rental——

The COURT. I am not going to proceed on the theory that that proposition is correct, that unimproved property is worth as much as improved property.

Mr. BUCHNER. Everybody apparently concedes that except the witness.

The COURT. There is some peculiarity in this transaction he wants to make clear; that is what I understand him to be testifying to.

By Mr. BUCHNER:

Q. Is that so? Do you think that this Kenyon-Kerr lease is something unique?

A. No, I don't.

By the COURT:

Q. Well, the fact is that the arrangement was the lessee was to put up the improvements——

A. The lessor; yes, sir.

258 Q. The lessor; and that the rent was to be predicated upon the property as improved?

A. Yes, and of course it is worth more improved than it was unimproved, naturally.

By Mr. BUCHNER:

Q. And did not the improvement and the cost of the improvement bear a proportion to the rental value?

A. I don't understand the question.

The COURT. That is only another way of putting the previous question. I will assume that is so, Mr. Buchner.

Q. The Thirty-third Street lease from the city to the Kerr Steamship Company, I understand, also was improved property?

A. Yes, sir.

Q. And the only piece of property that you have talked about that a lease was made of unimproved property was the property from the city to the Shewans?

A. Yes, sir.

Q. And which Shewan, as you yourself already said, had to get to extend his dry dock if he wanted to extend it?

A. Yes.

Q. And do you think that the price that a man pays for a strip of land which he must have to make a necessary improvement is a fair measure of the value?

A. It is when the city is the lessor.

Q. You think so?

A. Yes.

Q. And you think it is a perfectly proper item to take into consideration in figuring what the Langley property is worth?

A. I think so, because the city does not take advantage of the man's necessities.

Q. Then your theory of this thing is that the city, being mixed up in it, makes it different than the ordinary proposition?

A. I have said all I can on that subject.

259 Q. Your theory of this particular lease is that the city, being in it, makes it different than if it was between two individuals?

A. I assume if a private individual had the property and Shewan wanted it, he would get the last drop of blood from him. The city got what they considered a fair return from the property.

Q. But you think if anybody else had been in that position it would have been a different proposition?

A. Yes, sir.

Q. Let me ask you this: How do you figure that the rentals paid on these other leases affected the land value of the unimproved Langley property?

A. What lease do you refer to particularly?

Q. The three leases you have spoken about. From Arnott to Shewan; from Kenyon to Kerr, and from the city to the Kerr Steamship Company.

A. Take, for instance, the Arnott Estate: The improvements which the Arnott Estate had on that property did not, in my opinion, lend any value to it. It consisted merely of a bulkhead and some filling in and these two little platforms, the cost of all of which was insignificant, so that in my opinion it did not add anything to the value of the naked land.

Q. How about this building on it?

A. The building, of course, that was extra.

Q. What kind of building was that?

A. It was a building about 75 feet wide and 400 feet long, one-story, rough stone building.

Q. What would you say it was used for?

A. Storage warehouse.

Q. And how high was it?

A. One story.

Q. How high, height, feet?

A. How high up in the air?

Q. How much space was inside the building?

A. I should say about ten or fifteen feet high.

260 Q. Do you know?

A. No, sir. I didn't measure it.

Q. These piers you thought were so negligible were able to be used to berth vessels?

A. Good enough to tie up vessels at, but no surface on them. They were merely mooring piers.

By the COURT:

Q. Not to use the surface for the purpose of loading or unloading?

A. No, sir.

By Mr. BUCHNER:

Q. Good enough to tie up boats that Shewan was going to send to his dry dock?

A. Yes, sir.

Q. They were worth that to Shewan?

A. Yes, sir.

Q. You make no allowance at all for any of these matters?

A. Yes; I did. I made allowance for the building.

Q. Where did you get your figures to make an allowance for the building?

Mr. RIGGS. It seems to me this cross-examination is going over the same grounds over and over again without any way attempting to elicit from the witness any actual facts as to prices or dimensions, or anything in the way of facts which show value or tend to show value in any way.

The COURT. The question is directed to the methods employed in making his calculations.

(Question repeated by the stenographer.)

A. Which building?

Q. This warehouse on this Shewan leased property.

A. I did not get any special figures.

Q. Purely arbitrary calculation?

A. Yes.

261 By the COURT:

Q. Wasn't it based on any experience and general knowledge?

A. Based on general knowledge that the building was worth about 20 cents a cubic foot.

By Mr. BUCHNER:

Q. Where did you get that knowledge?

A. I don't know where I got it. I absorbed it, I think.

Q. You haven't had any building experience?

A. Not specially.

Q. Have you had any experience in this sort of building?

A. No.

Q. Do you know anything about the prices of building and building materials in 1918?

A. No; but I found out from builders what it would cost to put up a storage warehouse of that size.

Q. You found this out from different builders?

A. Yes, sir.

Q. And on that you based this value?

A. Yes, sir.

Q. As to your Kenyon-Kerr Steamship Company, did you figure that any part of this rental was due to the improvements?

A. Yes, sir.

Q. Did you figure that, in your mind, was the value of the improvements?

A. Yes, sir.

Q. Where did you get your figures?

A. Same source that I got the figures on the Langley property.

Q. People you talked to?

A. Chief engineer of the dock department.

Q. You talked to him about it?

A. I asked him to give me figures on the cost of construction.

Q. Of the Thirty-third Street pier from the city to the Kerr Steamship Company. Did you figure the cost of these improvements?

A. No, sir; that was one of the rental propositions.

262 Q. Did you figure that the pier on there played any part in the amount of rental that was paid?

A. No.

Q. You did not think so?

A. I did not take into consideration the cost of the pier in that case.

Q. Just took the flat rental?

A. Yes, sir.

Q. And compared that improved property with this other?

A. With the other as it would be improved, yes.

Q. Then you add to the Langley property the cost of improvement, previous improvement, do you?

A. This was the Langley property as improved as compared with the Thirty-third Street pier as improved.

Q. And the Langley property as improved, you fixed the cost as in this previous calculation of yours, from what you had learned from other engineers?

A. Yes, sir.

Q. This lease of the city property to Shewan at the foot of Twenty-eighth Street was all land under water?

A. Yes, sir.

Q. It started from the end of the city street, did it?

A. It was within the lines of the city street.

Q. And did you figure that it is the same thing as the Langley property?

A. No.

Q. Any comparison between them?

A. It is not as good as the Langley property. It is not so well located. Has not got such a large area by far.

Q. You figure the Langley property is worth more under lease than this property at the foot of Twenty-eighth Street, do you?

A. Yes, sir.

By the COURT:

Q. More per square foot?

A. Yes, sir; more per square foot.

263 By Mr. BUCHNER:

Q. How long has that lease to run?

A. The Shewan lease?

Q. Yes.

A. Ten years, with ten renewal.

The COURT. With how many years renewal?

The WITNESS. Ten years, with ten years renewal.

Q. Will you give me the date of that lease?

A. I am sorry to say I haven't got it.

Q. I thought you had some data there on it?

A. I have.

Q. You have got the terms of it, haven't you? The date it was made?

A. No, sir. It was made about 1918; I think the latter part of 1918. The date——

Q. You haven't got the date of the lease?

A. I don't think so.

Q. You are quite sure it was the latter part of 1918, are you?

A. Yes.

Q. Is that really on the bay?

A. On the bay. On Gowanus Bay.

Q. On the same bay this other Shewan property is?

A. Yes.

Q. And right alongside of the rest of the Shewan property?

A. Yes, sir.

Mr. BUCHNER. Now, if your honor please, I am going to move to strike out the testimony of Mr. Farley as to the $2.25. It is apparent he took these other things he says he used in making up his measure of value from hearsay, and he admits he is incompetent to judge of the inland property there, the one sale he spoke of,
264 and therefore it should be eliminated, and as to the improved property, he says he fixed the improvements upon hearsay evidence he has gotten from other people, as to some of them, he does not even remember from whom, as the Arnott Estate at Shewan. As to the others, it is the same sort of hearsay evidence upon which his measure of value was based, and I think it is objectionable for the same reason, and I think his testimony should be stricken out as to the second measure of value.

The COURT. Motion denied.

Mr. BUCHNER. Exception.

Redirect examination by Mr. RIGGS:

Q. Now, Mr. Farley, you were asked yesterday with regard to the separation of the two Langley parcels. In your opinion, would the parcels have a higher unit value if the two parcels were placed together?

A. Yes, sir.

Q. Did you value them as of April 6th, 1918, as they were at that time?

A. As they were at that time.

Q. And adopted the unit of value as of that time?

A. Yes, sir.

Q. Are you able to state how much of a higher unit of value you would have used, if any, if those two parcels had been joined?

Mr. BUCHNER. Objected to.

(Question withdrawn.)

Q. Now, Mr. Farley, you also spoke of making a unit of value of
$2.25 a square foot, and I understood you to say the different leases you had actual knowledge of, and also sales which have
265 been testified to here, were what you need, is that correct?

A. Yes, sir.

Q. Of which the consideration and dimensions of the property had been reported to you?

A. Yes, sir.

Q. And coming to these leases now, will you please give the particulars in regard to the Kerr Steamship lease made by Clarence Kenyon September 8th, 1916, being the kind of property rented, the total of rental, and the term of the rental, and the other covenants and conditions of the lease?

Mr. BUCHNER. I object.

The COURT. Objection sustained.

Mr. RIGGS. Exception. I offer in evidence copy of lease made the 8th of September, 1916, by Clarence Kenyon, party of the first part, and Henry F. Kerr and Alfred E. Clegg, doing business under the firm name and style of the Kerr Steamship Company, party of the second part.

Mr. BUCHNER. Objected to, but not on the ground that the lease is a copy.

The COURT. Objection sustained.

Mr. RIGGS. Does your honor mean to exclude the lease upon the ground it is not the proper proof?

The COURT. Yes. It is not part of the issues.

Mr. RIGGS. I take exception, and desire to point out to your honor that under the law of this State, upon redirect examination in condemnation cases, counsel has the right, if on cross-examination opposing counsel asks any particulars or asks anything at all in
266 regard to a certain real estate transaction, that upon redirect examination counsel has the right to bring out and to show all the particulars of such transaction, and my friend, Mr. Buchner, having asked about this lease and carefully refrained from bring-

ing out any such questions as the price and other particulars, then under redirect examination I have the right to ask him all the particulars in regard to the transaction.

The COURT. You have the exception to the ruling.

Mr. RIGGS. I take an exception.

Q. Will you please state for the record, Mr. Farley, all of the particulars in regard to the lease of the Arnott Estate to Shewan which were referred to in your cross examination, giving the dates, the names of the parties, the consideration, and the description and dimensions of the property leased?

Mr. BUCHNER. I object to that on the ground it is not the proper way to prove a written instrument.

The COURT. Objection sustained.

Mr. RIGGS. Exception.

Q. Will you please state, Mr. Farley, what you assumed were the terms of the lease of Clarence Kenyon to the Kerr Steamship Company, dated September 8th, 1916, in regard to the terms, consideration, and description of the property leased in considering the value of the Langley property?

Mr. BUCHNER. Objected to.

The COURT. Objection sustained.

Mr. RIGGS. Exception.

267 Q. Will you please state for the record——

The COURT. Do not ask another question on that point. You have two or three questions. If one is good they are all good.

Mr. RIGGS. Do I understand, if your honor please, that your honor excludes this upon the ground that Mr. Farley necessarily in analyzing these leases, for instance, must have considered the cost of improvements, and that as to those costs of improvements on the property he knows nothing, or is it incompetent because of the actual leases not being in evidence?

The COURT. When you asked him about the leases, the objection was made it was not the best proof, which was the basis upon which the testimony was excluded; and then when you produced a copy of the lease an objection was made on the ground it was not part of the issues, the objection was sustained.

Mr. RIGGS. It was sustained upon both grounds?

The COURT. Yes.

Mr. RIGGS. I can readily procure originals of the leases to the Kerr Steamship Company and the Shewans, and I understand that the leases thus produced would be similarly excluded?

The COURT. Mr. Riggs wants to know if he brings the original leases——

Mr. BUCHNER. I would make the same objection to them that I have made to the Kenyon-Kerr Steamship leases.

Mr. RIGGS. And I take it the ruling would be the same?

268 The COURT. Yes; they would be excluded.

Mr. RIGGS. And I take an exception.

Q. Mr. Farley, when you testified I noticed that you had a plan in your hand showing the location of certain piers upon the Langley property. Will you produce that plan?

(Witness produces plan.)

Q. Is that the plan I referred to?

A. Yes, sir.

Q. Is the plan which you hold in your hand, in your opinion, a feasible and proper development of the Langley property and proper use for the Langley property?

Mr. BUCHNER. Objected to as not proper redirect examination.

The COURT. Of course, it is not proper redirect, and the court served notice to counsel that if objection was made that rule would be made. That course will be followed hereafter. Exception overruled.

Mr. BUCHNER. Exception.

A. Yes, sir.

Q. Will you hand that to me, Mr. Farley?

(Paper handed to counsel.)

Mr. RIGGS. I offer the plan in evidence.

Mr. BUCHNER. I understand your honor has ruled it in over my objection before.

The COURT. It was only the question, Does this plan represent a suitable improvement in the property? and objection was interposed and overruled. This is the first offer of the plan itself. Objection overruled.

Mr. BUCHNER. Exception.

269 (Received in evidence and marked "Plaintiff's Exhibit T" of this date.)

Q. Does this plan, Exhibit T, in evidence, Mr. Farley, also show what, in your opinion, is a proper arrangement of warehouses upon the upland of the Langley property?

Mr. BUCHNER. I object to that upon the ground the witness is not competent to testify as to any such fact.

The COURT. Objection overruled.

A. Yes, sir.

Q. Mr. Farley, will you please tell me the units used by you of construction as obtained by the dock department and from Mr. Trout in figuring the cost of improvements in accordance with the plan Exhibit T in evidence?

Mr. BUCHNER. I object to that on the ground it is clearly hearsay.

The COURT. Objection overruled.

Mr. BUCHNER. Exception.

The COURT. I will take it upon statement of counsel that it will be connected.

Q. Just give the units.

A. Dredging, 65 cents per cubic yard; bulkhead wall, $100 per linear foot; piers, $2 per square foot; sheds, $1.93 per square foot.

Q. Warehouses?

A. Warehouses, I haven't got the details of construction; I merely have the total.

Q. And will you state what the total amount given you by Mr. Trout was for the construction of the warehouses?

Mr. BUCHNER. I object to that as hearsay.

270 The COURT. I am not receiving it as part of the proof of the statement.

Mr. RIGGS. I will restrict the evidence and say it is not part of the facts themselves but part of what the witness relied on in his computations.

A. $4,560,000.

Q. What was the total cost of construction of piers that you relied upon in making your computation as given you by Mr. Trout?

A. The cost of improving both parcels, $2,384,501.

Q. Now, Mr. Farley, based upon your knowledge of conditions throughout the harbor and leases of property as improved, what, in your opinion, was the rental value of the total Langley property as improved?

Mr. BUCHNER. I object to that. I think it ought to be——

The COURT. Objection overruled.

Mr. BUCHNER. Exception.

A. The total annual rental, $717,756.

Q. That is, you mean, the annual rental value as improved in accordance with the way you have computed?

A. Yes, sir.

Q. Does that include the rental values of the warehouses?

A. No, sir.

Q. Then give me the rental value of the warehouses so improved.

A. I estimate the rental value of the warehouses $609,840.

Recross-examination by Mr. BUCHNER:

Q. What did you say the warehouses would bring?

A. $609,840.

271 Q. Did I understand that you took for granted in making these calculations that the entire cost of the construction of the piers was $2,384,501?

A. Yes, sir.

Q. And that the cost for the construction of the warehouses is $1,560,000?

A. Was what?

Q. The cost of the construction of the warehouses was $1,000,000——

A. Four million.

Q. Then you took it for granted that the entire cost of construction of the piers and the—how much did you say the sheds cost you?

A. The unit?

Q. Yes.

A. $1.93 per square foot.

Q. And where do you include the cost of the construction of the sheds, in the piers or warehouses?

A. Piers.

Q. You used—it cost $6,944,501, the entire improvement there?

A. The piers and the warehouses.

Q. Is there anything else now?

A. Is that the entire cost of that improvement?

A. Yes.

Q. You don't know anything about how close these values represent market value at that time?.

A. I beg your pardon?

Q. You of your own knowledge don't know anything about how closely these——

A. Cost of construction, you mean?

Q. Yes.

A. No, sir.

Q. Where did you get your measure of value of the rental of the warehouses?

A. From the president of the New York Dock Company.

Q. He told you that?

A. Yes, sir.

Q. What did you use as your unit?

A. Fifty cents square foot.

Q. Don't you know you could get warehouse space in the Bush Terminal in 1918 for thirty cents a square foot?

A. No, sir; I don't know that.

272 Q. Bush Terminal is better for warehouses than even the Langley property improved, isn't it?

A. You mean in regard to location?

Q. Yes.

A. Yes, sir.

Q. Better in regard to other facilities, too?

A. Bush warehouses is a little old now.

Q. You mean they are not up to date?

A. I mean that Bush warehouses are not up to date.

Q. The Bush warehouses are better located for men looking for storehouses than the Langley property would have been?

A. Yes, sir.

Q. You admit that?

A. Yes, sir.

Q. Then you think they were worth a little more?

A. Yes, sir.

Q. What unit of value did you use for your piers' rental?

Mr. Riggs. May it please the court, I object to this as not proper recross-examination.

The Court. Objection overruled.

Mr. Riggs. Exception.

Q. What did you use as your unit of value in the rental of the piers? What area did you use?

The COURT. You mean square feet?

Q. That is what I mean, linear or square feet? How did you figure the piers?

A. Linear feet basis.

Q. How much per linear foot did you figure these piers were worth, or would have been worth?

A. The three piers would have rented for $658,800.

Q. I thought you said $717,756 was the rental?

A. That included the rental of the bulkhead and the rental of the upland.

273 Q. What upland?

A. The upland inshore of the bulkhead.

Q. How much upland did you leave between the pier and the warehouse?

A. Between the bulkhead and First Avenue there were 410 feet, and I allowed 50 feet for a driveway, a marginal way along the entire strip of bulkhead.

Q. And this other is made up of the rest of that property?

A. The balance is made up of the rest of that property.

Q. Where were you going to put your warehouse, suspend it?

A. This was entirely different from the warehouse proposition. I figured the warehouse different from the piers.

Q. Then you included the same twice?

A. No, sir.

Q. The upland——

A. The warehouse is a separate calculation entirely.

Q. I understand all that, but as a matter of fact, haven't you taken the same area twice? Didn't you figure it first as warehouse, and then again with the warehouse?

A. I figured that first with the warehouse, and then figured the warehouse area separately.

Q. When you figured it first you got $717,756?

A. Yes, sir.

Q. Why didn't you make the deduction when you figured that other area? You have got to allow for that?

A. The warehouse proposition was figured on an entirely different basis. That is an entirely different proposition entirely.

Q. As a matter of fact, isn't this what happened: You figured 50 feet driveway along the bulkhead line and then the rest you figured in at a certain rental?

A. Yes, sir.

Q. And then you make $717,756, is that right?

A. Yes, sir.

274 Q. And when you took out the amount of area that is under the warehouse and you will only get $658,000, is that right?

A. You don't understand it.

Q. I thought——

A. You take $717,756 and capitalize that amount——

Q. Let us not capitalize anything.

A. Wait a minute; and divide that by the total area 1,714,322 square feet and the answer is $2.33. Now, then, the warehouse proposition is based upon earnings of so much per square foot per floor, and has nothing to do with the area of the pier improvement at all.

Q. But don't you see, Mr. Farley, as a man who has figured real estate yourself for so long—don't you see you are twice using a certain area of income?

A. No, I am not. Take the pier improvement as one proposition and divide that by the total area. The warehouse proposition is an entirely different one.

Q. You have taken the total area in twice, then, haven't you?

A. No, sir; only once; 1,714,322.

Q. Now, is that 1,714,322 the area exclusive of what the warehouses are on?

A. The warehouses don't figure in that proposition at all.

Q. As if you can tell me how you can arbitrarily make any such calculation—where do you get those figures from?

A. Which?

Q. 1,714,322?

A. That includes all the area of the Langley property.

Q. That is the whole thing?

A. Yes.

Q. When you once figure the land value of the property, income bearing, you cannot again put on the strip an improvement and figure it all over again?

A. Do you mean the warehouses?

Q. Yes.

275 A. I said they were considered entirely separately. They don't figure in the pier improvement at all.

Q. They figure twice in yours?

A. No, sir; that is a separate calculation entirely, based upon the fact some person might want to use the upland for something else than storage warehouse.

Q. If anybody used that land with just the pier and the 50-foot driveway——

A. Fifty feet.

Q. (Continuing.) Along the pier bulkhead line, and the rest of it unimproved, you figure the income sum was $717,756 and——

A. Naked, and the upland back to First Avenue.

Q. Without anything on it?

A. Yes, sir.

Q. How many square feet did you use for your warehouse?

A. For my warehouse?

Q. Yes.

A. The total amount of area of the buildings is 213,000—that is, the land itself—213,280. In addition to that there were 89,600 feet for a driveway.

Q. That you cannot use?

A. That we used for driveway, and on which buildings would not be constructed.

Q. Did you at any place deduct the 89,600 feet the city claims in making this calculation?

A. I used the extensions of the city streets as driveways.

Q. Didn't you use that 213,280 square feet you have figured in twice?

A. No.

Q. You cannot see that?

A. I did not.

Q. You—how much a linear foot do you figure those piers would have brought?

A. A linear foot?

Q. Yes? That is the way you figured it.

A. I figured it on a berthing space.

Q. Well, a berthing space is a space alongside of a pier?

A. Yes, sir. I figured out there were 18 berths; that is,
276 six berths on each pier. For 244 days, the 244 being 365 days less 33⅓ per cent. for idle time. I figured those 18 berths at $150 a day, which is $50 a day less than the leased price paid in 1918 for somewhat similar accommodations.

Q. Well, now, what proportion did your rentals, as you figured them, bear to the Kerr Steamship Company rentals, which you said was the lowest in the bay and the nearest to the Langley property?

A. The price obtained by the Kerr Steamship Company was $200 a day for berths at their pier.

Q. You made that lease?

A. Yes, sir.

Q. That was what the Kerr Steamship Company got?

A. Yes, sir.

Q. But that was not what Kenyon, the owner, got for it?

A. No, sir.

Q. In this 11¼ per cent., you figured you make 7 per cent of that profit or return on investment?

A. Two per cent. for taxes and 7 per cent.—six per cent. for maintenance on the structures alone.

Q. Six per cent. on the structures alone?

The COURT. Six per cent.?

The WITNESS. Yes, sir. We use 7 per cent. instead, 2 per cent. for taxes, and 2¼ per cent. for maintenance and repairs on the total, which resolves it self down to 6 per cent. on the improvement, which is the only part requires maintenance and repairs.

Q. You have that all on there? All the charges you have to put in?

A. Yes, sir.

Q. Then you know if you were to try and manage a proposition like that, the Langley Estate would have to put an administrator in there?

A. Why?

277 Q. Because you are going to do the leasing of the berths and wharves?

A. That cost is not considerable.

Q. To handle separately?

A. To run either berths or piers requires very little of a force.

Q. You are going to have over a million dollars' worth of business down there?

A. It does not require but very little force. The lights are extra and the cleaning of the piers the stevedores have to do. I don't find it difficult to operate piers with a very small force.

Q. And renting out space in the warehouse?

A. That is entirely different proposition. We are talking about piers now.

Q. Do you include that in it?

A. In what?

Q. In what expenses you would have to get out of this thing?

A. You are talking about a pier improvement now. I am not talking about warehouses.

Q. I thought you were talking about both?

A. The pier improvement is one proposition and the warehouse another.

Q. They are going to be run by separate companies?

A. They might be run by separate companies.

Q. If the owner of that property was to run two corporations he would have to have two salary and executive charges for two different companies. What are you going to do with those?

A. As I say, the cost of running the piers is very little or nothing.

Q. Don't you have watchmen or all that sort of thing?

A. No, sir; the ship does that.

Q. Don't you have to have men on the piers at all?

A. No, sir.

Q. Nobody at all there?

A. Nobody at all.

278 Q. You are going to have shedded piers there or not shedded?

A. Shedded piers.

Q. How do you know you could put them there?

A. How did I know I could put them there?

Q. Yes. You would have to get the permission of the dock commissioner, wouldn't you?

A. You don't suppose the dock commissioner would refuse permission?

Q. He might.

A. He never has.

Q. You were taking for granted you could get it?

A. Yes, sir.

Q. If you couldn't get permission for shedded piers, that property would not be worth anywhere near what you think it is?

A. No, sir.

Q. How much would that revenue of the piers be cut down if you could not get permission to shed those piers?

Mr. Riggs. Objected to as calling for the conclusion of the witness.

The Court. Objection overruled.

Mr. Riggs. Exception.

A. If you could not have shedded piers there you might better leave the property as it is.

Q. It would not be worth anything?

A. No.

Q. Do you know anything about the tax rate there?

A. Yes.

Q. How long have you had anything to do with this property tax rate?

A. I never had anything to do with that.

Q. Do you know what the tax rate was for 1918?

A. Yes.

Q. How much?

A. The tax rate for 1918 for Brooklyn is $2.40.

Q. That is a little more than two per cent?

279 A. But you don't tax the cost of the improvement, and you don't tax the dredging, and the structures don't reach full value the day after they are built.

Q. Do they deteriorate?

A. They are not new, and they are not taxed as new structures.

Q. Property in that section of Brooklyn would be in position to get the benefit of all the weather conditions, all the storms, anywhere?

A. Property in any section of the water front gets the benefit of all the water conditions.

Q. Gets a lot of ice down there?

A. I don't know anything about that. I never had any more complaints about it than any other section of the South Brooklyn shore.

Q. Do you know anything about the tides down there?

A. In what respect?

Q. As bearing on the length of time a pier will stand up in that section.

A. The Bush piers have stood up well for the length of time they have been there.

Q. In fact, the property would be deteriorating so slowly that the per cent deterioration on the building would be made up by the rents; isn't that what your figures show?

A. My figures show a man gets 7 per cent on his money, and is allowed about 6 per cent on the cost of construction for maintenance and repairs.

Q. Six per cent on the maintenance charge for warehouse is——

A. I am talking about piers now.

Q. I thought you spoke about 6 per cent on a warehouse.

A. I did not.

Q. Where did you make your 2¼ per cent, then?

A. That is 7 per cent for interest——

Q. I mean your 2½ per cent maintenance charges?

A. Where did I get it?

280 Q. Yes.

A. Two and one-fourth per cent of the total cost of the property plus the cost of the improvements resolves itself into 6 per cent on the cost of the improvements, because there is no maintenance and repairs on naked land.

Q. You have allowed 6 per cent on all these improvements for maintenance?

A. Repairs and maintenance.

Q. That is where you got your 2¼ per cent?

A. Yes, sir.

Q. How do you fix 6 per cent as your maintenance charges down in that section of Brooklyn on this type of building?

A. From information which I received while connected with the dock department in the course of my duties, which led me to believe that the rate to be allowed for maintenance and repairs was between 4 and 5 per cent. In order to be on the safe side I allowed six.

Q. That was 1918?

A. That was all the time.

Q. Do you know how much labor and material and that sort of thing has fluctuated in value in the year between 1917 and 1918, for instance?

A. I don't know the exact figures; I know it fluctuated some.

Q. Where did you get that information from?

A. From the figures we obtained down in the dock department for contract work.

Q. If the Langley Estate property was fixed up as you want it done, and improved, as you suggest, with the sheds, and the owner leased it as the Kenyons did to the Kerr Steamship Company, what would you consider that property was worth?

A. If he leased it to somebody else?

Q. Yes; to someone like the Kerr Steamship Company?

A. I don't think that would affect the situation at all.

281 Q. You think it would be worth just as much for the owner?

A. Yes, sir.

Q. But he would not be getting anything like the return you think he ought to get.

A. He would get it from the lessee, and the lessee would add to that his profit.

Q. Why, in adding to the value of these piers, don't you take what the Kerr Steamship Company is paying Kenyon instead of what the Kerr Steamship Company is getting from the other people?

A. Because the Kerr lease was made in 1916.

Q. What has that got to do with it?

A. Water-front property was not as valuable in 1916 as in 1918.

Q. Around that time shipping in the harbor of New York was quite congested?

A. No, sir.

Q. Weren't they using every ocean bottom they had to send across?

A. I don't know anything about that; those things were kept secret; but I know there was not such a demand in 1916 as in 1917 and 1918 and since.

Q. You don't think there were as many commercial ships plying previous to the declaration of war as there were after?

A. I don't know. The movements of vessels were kept secret by the Government.

Q. I am talking about commercial vessels.

A. They were kept secret, too.

Q. Secret from you?

A. Secret from everybody.

Q. You could not take this congestion of the harbor into consideration?

A. I am taking into consideration the demand for ships.

Q. And there was more demand in 1916 than in 1918?

A. That is not what I said. I said there was more demand in 1918 than in 1916.

282 Q. Wasn't that fact due to the Government taking over a lot of these other piers and these people had to find another place?

Mr. RIGGS. Objected to as not proper recross-examination.

The COURT. The court, on its own motion hereafter, will restrict the cross-examination to proper cross-examination, the redirect examination to proper redirect, and the recross to proper recross.

CHARLES E. TROUT, recalled as a witness on behalf of the plaintiff, further testified as follows:

Direct examination by Mr. RIGGS.

Q. Mr. Trout, are you familiar with the construction, physical construction of piers in the harbor of the city of New York?

A. Yes.

Q. How long have you been familiar with such construction?

A. Twenty years.

Q. What positions have you held in which you have had to do with the construction of piers and water-front improvements in the harbor?

A. Assistant engineer of the Department of Docks and Ferries, city of New York.

Q. While you were assistant engineer of the Department of Docks and Ferries of the city of New York did you figure for the city of New York upon the cost of construction of bulkheads and of piers?

A. Yes.

Q. How many years did that experience last?

A. Twenty years or more—well, eighteen years.

Q. Proceed.

A. Also as superintendent for the Turner Construction Company in charge of water-front work at the Army base.

283 Q. Did you figure upon the construction of work for the United States Government at the Army base?

A. I did. And as engineer for Henry Steers (Inc.).

Q. What is the business of Henry Steers (Inc.).

A. Building piers, bulkheads, pier sheds——

Q. Are you familiar with the cost of construction of piers?

A. Yes.

Q. Were you familiar with the cost as it was in March or April? And May, 1918?

A. Yes.

Q. And around that time?

A. Yes.

Q. At my request did you make a computation as to the cost of construction of certain piers upon the property of the Langley estate in Bay Ride as of April, 1918?

A. I did.

Q. Did you make a computation of the units of cost?

A. Yes.

Q. Did you hear the units of cost as stated by Mr. Farley upon the record, as used by him?

A. I did.

Q. Were they the same units of cost you gave him as the result of your computation?

Mr. BUCHNER. I object to that.

A. They were.

The COURT. Let him give us the information he gave Mr. Farley.

Q. What information did you give Mr. Farley as to the cost of construction of piers per cubic foot?

A. Gave him the unit of dredging, 65 cents a cubic yard; gave for pier construction, $2 a square foot; gave for pier shed construction, $1.93 a square foot, and cost of bulkhead construction, $100 per linear foot.

Q. And as to warehouses?

A. I gave Mr. Farley an estimate of $1.30 a square foot of
284 floor and wall, which I afterwards figured out for him was 30 cents a cubic foot on the warehouses he was inquiring of.

Q. Were those units, in your opinion, the fair and reasonable cost of construction of piers, sheds, bulkheads, and warehouses as in April, 1918?

A. They were.

Mr. RIGGS. That is all.

Cross-examination by Mr. BUCHNER:

Q. Are those the only figures you gave him, the units?

A. No.

Q. Did you make calculations yourself for him?

A. No; Mr. Farley made his own calculations on the figures I gave him.

Q. You did not have anything to do with that?

A. No.

Q. All you gave him were these items of value of the different classes of work?

A. Yes, sir.

By the COURT:

Q. That is, the cost of construction?

A. Yes, sir.

By Mr. BUCHNER:

Q. As a matter of fact, Mr. Trout, in April, 1918, was not the labor and material market so fluctuating that it was almost impossible to fix a definite price on this sort of thing?

A. I would not say that. The labor market has never fluctuated very greatly. The price of labor is fixed by the union rates, and the rate was constant through 1918 until the date of the armistice, and there were very few changes.

Q. And material, too?

285 A. Material was difficult to get, but the prices were generally fixed by the United States, and if you could get them——

Q. There was not any proof you could get them after you got the price?

A. No.

Q. As a matter of fact, do you think yourself it would have been easy for an ordinary person to have built these piers in April, 1918?

A. It would have been possible.

Q. Would it have been easy?

A. No; it is never easy to build piers.

Q. Would it have been as easy as it was in 1916, let us say?

A. No; it would not have been as easy.

Q. There was a good deal of difficulty in getting labor and material sufficient to do any work such as this at that time, wasn't there, Mr. Trout?

A. I would not say that. We built a much more extensive improvement at that place and had very little difficulty in getting labor.

Q. For whom?

A. The United States Government.

Q. But you don't believe you would have found it as easy to build them for some other individual?

A. Oh, no.

Q. Do you think the Government's prices at that time were fair and reasonable?

A. Yes.

Q. How long——

The COURT. What do you mean, Government's prices?

Mr. BUCHNER. The price the Government paid for that class of work.

Q. How long do you believe it would have taken to build piers like this if a private individual started in April, 1918?

A. It would have taken him a year and a half, perhaps.

Q. And do you suppose he could have built his warehouses also within that time?

A. Oh, yes.

286 Q. You think it could have been done in a year and a half?

A. Yes, sir.

Q. That means it would have been about the latter part of 1919 when it was in condition for business?

A. Yes, sir.

Mr. BUCHNER. That is all.

Mr. RIGGS. Will your honor rule upon the motion to strike out the testimony of Mr. Farley?

The COURT. I think his testimony should stand.

Mr. BUCHNER. Exception.

LEWIS H. POUNDS, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. RIGGS:

Q. Where do you live?

A. 317 East Seventeenth Street, Brooklyn.

Q. Your business address is what?

A. 32 Court Street.

Q. What is your business, Mr. Pounds?

A. Real estate.

Q. How long have you been engaged in the real estate business?

A. Twenty years.

Q. During that time have you bought and sold property in the Borough of Brooklyn?

A. I have.

Q. Have you bought and sold property in other boroughs?

A. Some in Queens, not much.

Q. Are you familiar with values of property in the Borough of Brooklyn?

A. I am.

Q. Have you acted as appraiser for any interests in the Borough of Brooklyn?

A. To a limited extent.

287 Q. For whom have you appraised?

A. For the banking department, and for certain individuals and interests for loans at times.

Q. Are you familiar with the values of water-front property in the Borough of Brooklyn?

A. I think I am.

Q. How did you obtain such familiarity with such water-front values in the Borough of Brooklyn?

A. I got my first education in that and similar properties while a member of the board of estimate and port and terminal committee.

By the COURT:

Q. During that time you were borough president of the Borough of Brooklyn?

The WITNESS. The board of estimate and port and terminal committee.

By Mr. RIGGS:

Q. Of the city of New York?

A. Yes, sir.

The COURT. I think my question should be answered, too.

Mr. RIGGS. I beg your honor's pardon.

By the COURT:

Q. During which time you were the borough president of the Borough of Brooklyn?

A. Yes, sir.

By Mr. RIGGS:

Q. How long were you on the port and terminal committee of the board of estimate?

A. I was a member of the committee for about four and one-half years.

Q. During that time did you have occasion to inspect the
288 water front of the Borough of Brooklyn and the Borough of Manhattan and the various other boroughs?

A. Yes, sir.

Q. Did you have occasion to inquire into the values of property along the South Brooklyn shore, for instance?

A. We did.

Q. Did you have occasion to inquire into any sales or leases of property in the harbor of New York?

A. That came up in the question of South Brooklyn, also the question came up in considering the west side question, so-called, the New York Central improvement, Manhattan.

Q. Have you testified as an expert witness in proceedings concerning water-front property in Brooklyn?

A. I have.

Q. Name them, please?

A. The First Construction Company against the city is the only one I have testified in as an expert on water front.

Q. That case occurred since you left the office of borough president?

A. Yes, sir.

Q. Do you know the values of water-front property in South Brooklyn?

A. I think I do.

Q. How long have you been familiar with the South Brooklyn shore?

A. Well, I don't think I can say I have been familiar with it for more than ten years.

Q. Were you familiar with the property of the Langley Estate as it was prior to the requisitioning by the Government?

A. I have seen it.

Q. Familiar with the property of the city of New York between the two pieces of the Langley Estate?

A. Yes.

Q. Do you know if the property of the Langley Estate was similar to that of the city of New York?

A. Yes.

Q. Have you examined the property of the Langley Estate with a view to testifying to its value in this proceeding?

A. Yes, sir.

289 Q. Did you hear the description of the property by Mr. Graham as to its location and dimensions?

A. Yes, sir.

Q. Have you anything to add or detract from that description?

A. None.

Q. What, in your opinion, was the best use to which the property of the Langley Estate could have been put in April, 1918?

A. For the erection of long piers, and with warehouse spaces.

Q. And how long piers, in your opinion, would have been a suitable improvement for the property?

A. About 1,400 feet.

Q. What, in your opinion, was the fair and reasonable market value of the two parcels of the Langley Estate requisitioned by the Government in April, 1918?

A. $3,685,792.30.

Q. In making that appraisal, did I ask you to figure upon a certain amount of square feet area?

A. You did.

Q. What was the square feet area I asked you to appraise this property upon the assumption that it contained?

A. 1,714,322.

Q. Did I also ask you to make an appraisal of the property upon the assumption that the title to the streets from the westerly side of First Avenue to the existing high-water mark as of April, 1918, was in the city of New York, of Sixty-first, Sixty-second, and Sixty-third Streets?

A. You asked a figure both ways.

Q. What, in your opinion, was the value of the property upon the assumption that those streets I have enumerated belonged to the city of New York in 1918?

A. The same as the figure just given.

The Court. Be very careful you have completed Mr.

290 Pound's direct examination because in redirect examination you will be held strictly to what was brought out on cross-examination.

Mr. Riggs. Yes, sir.

Cross-examination by Mr. BUCHNER:

Q. Outside of the First Construction Company against The City of New York, what other cases have you testified in as an expert in the value of water-front property in the Borough of Brooklyn?

A. No other.

Q. That is the only one?

A. Yes.

Q. The large portion of your real estate experience is in a different section of Brooklyn, isn't it, than the water front of South Brooklyn?

A. Yes.

Q. You specialize largely in Flatbush property and the surrounding neighborhood there?

A. Yes.

Q. The measure of value as to this property and the water-front property of South Brooklyn you will concede, I imagine, is entirely different, isn't it?

A. I would.

Q. Now, the First Construction Company against The City of New York, what property was that you testified to? A. That was the property appropriated by the State of New York for a barge canal.

Q. Where was that?

A. On the Gowanus Bay, from Columbia Street running easterly, taking in, as I recall, about a million and a half square feet.

Q. When was that you fixed that value?

A. That was in—I testified in December, 1918.

Q. Fixing the value as of December, 1918?

291 A. No, that value was fixed as of the date of the appropriation which, as I recall it, was 1912.

Q. What value did you put on it?

A. $1.65 a square foot.

Q. How much was officially determined, do you know?

Mr. RIGGS. Objected to as incompetent, improper, not proper evidence of value.

The COURT. Objection sustained.

Mr. BUCHNER. Exception.

Q. The four and one-half years that you served on the port and terminal commission, Mr. Pounds, expired when?

A. Expired December 31st, 1917.

By the COURT:

Q. Your service on that commission began before you took office as borough president?

A. I acted for Judge Steers on the same committee, but I served in my own right, finished his term and also my own term of four years. I followed Judge Steers.

Q. I had forgotten you succeeded him prior to your election.

A. I was commissioner of public works for three and one-half years under Judge Steers, my administration beginning January 1st,

1910, when he was elected city magistrate; I was elected to fill his unexpired term and then elected for four years after that.

By Mr. BUCHNER:

Q. Since 1917, when your term of office expired, Mr. Pounds, how often have you gone down in the South Brooklyn section and inspected the water front there?

A. I have been down a number of times.

292 Q. How often, about?

A. I could not say. I have been down in Erie Basin and in that vicinity quite frequently.

Q. Have you been south of the Erie Basin?

A. Yes; many times.

Q. How often?

A. I cannot say how many.

Q. When did you go down and examine this Langley property with a view to testifying in this proceeding?

A. I was down there first, I think, in March.

Q. This year?

A. This year.

Q. Previous to that when had you seen it?

A. I had seen it in a general way, and as you would see it from the upper streets, a number of times previous.

Q. You don't think that that casual glance you gave it in passing would be a fair measure of the importance that you would attach to an appraisal, do you?

A. No.

Q. You cannot make an appraisal on any such casual looking over as that, can you?

A. No.

Q. Is that the only kind of view you had of it previous to March of this year?

A. Oh, no; I was down there during this year and 1918 all along a number of times.

Q. In 1918 when you were down there did you go down and look over the Langley property?

A. Not specially.

Q. When were you down there, what part of 1918?

A. I was down there along early in the summer, when the talk was regarding the improvement they were putting there, the Government, and various properties being taken.

Q. How early in the summer were you there, do you remember?

A. I could not say.

Q. How often in 1918 were you there?

A. I would not say how often. Several times, though.

293 Q. Did you look over anything outside of the Langley property?

A. Yes.

Q. What?

A. I looked along the Bush property and all the way along.

Q. Were you looking these things over as a sightseer or as an expert, or just casually passing?

A. I was looking them over merely in the capacity of studying the water front and keeping informed of what the Government was doing.

Q. The Government was making improvements at the time you were there?

A. Yes, sir.

Q. How far had they progressed? Any signs of the piers being built?

A. Improvements all along there from Twenty-eighth to Twenty-ninth Street, at various places all the way down. Not all the way, but at certain places.

Q. Were you alone when you went down there?

A. I went down several times alone.

Q. Did you get passed inside the Government's lines?

A. I have had such passes. I don't remember when I had them or when I exercised them.

Q. You don't remember whether it was in 1918 that you had passed inside those lines?

A. Yes; I was inside the lines where you have to have a pass once or twice, anyhow, as I recall.

Q. Can you tell us about when that was?

A. No; I can not. It was along in the summer.

Q. Previous to the Government starting these improvements had you been in that vicinity?

A. During what time?

Q. Just previous to these improvements in 1918 had you been down there?

A. I was along the property there but I can not say I was right on this property in the spring or at what time.

294 Did you make what you would call a careful study or looking over this Langley property at any time previous to April, 1918?

A. I don't know that I can say I did make a careful study previous to that. I knew it in a general way and had seen it.

Q. You had not paid any particular attention to that particular property, water conditions, and things of that sort previous to that?

A. Except in a general way.

Q. Very general?

A. Yes.

Q. You paid no more attention to the Langley property than any other property that you had passed along the water front?

A. Well, yes; I think there would be more than that because all of that property along there was of special interest and called for special notice.

Q. All of the property along where?

A. Along the South Brooklyn front where the activity was.

Q. What do you mean, activity? When was this period of activity that you speak of?

A. All the time during war times and especially along early in 1918; during 1917 there was a great deal of talk about what was going to be done down there by the Government.

Q. Did you ever go down and look over the Kenyon property when they were building that pier that was afterwards leased to the Kerr people?

A. Yes.

Q. How often were you down there when that was going on?

A. A good many times.

Q. In your fixing of this value here, Mr. Pounds, did you take a unit of value?

A. I did.

Q. And what unit of value did you take?

A. Two dollars and fifteen cents a square foot.

Q. You think that is the fair and reasonable value?

A. I do.

295 Q. How closely do you consider that different real estate experts' values, or estimates of value, should be before you say they conflict?

Mr. RIGGS. I object to that.

The COURT. Objection overruled.

Mr. RIGGS. Exception.

A. I don't know. I never gave any consideration to that.

Q. You did not consider the other estimates of value made here by the men who preceded you on the stand as in any way bearing on the value of that property, in your opinion?

A. No.

Q. Have you made any other appraisals of waterfront property, Mr. Pounds, outside of the one you are making here for the Langley estate and the one you have made for the First Construction Company?

A. Yes; I made some appraisals for the Tebot property, Mr. Todd's property at the foot of Twenty-third Street, the old Dime Savings Bank property, the Tebot Basin property, and the White property.

Q. Where is that?

A. Lies from Twenty-second street about to Twenty-third, Twenty-fourth Streets.

Q. Was that improved property, all that?

A. It is now, most of it.

Q. Was it improved when you made the appraisals?

A. Partially improved.

Q. When were the appraisals made?

A. I think a little over a year ago.

Q. And were they made as of that date?

A. Yes. Well, now, I won't be sure but about that, I think.

Q. Previous to that had you made any other appraisals of waterfront property in South Brooklyn?

A. No.

296 Q. What do you consider are the items that you should take into consideration in figuring the value of this Langley property?

A. I have considered the market value in the light of what a willing purchaser would pay, who was willing but not obliged to buy, from a seller who was willing but not obliged to sell. I have considered the present and prospective use of this property, including the best use to which it could be put, and what it was reasonable to suppose it would be applied to. I have also taken into consideration the facts that there was a rapidly diminishing supply and an increasing demand for property of this character. I also considered that for ten years at least that increase of demand and decrease of supply had been most pronounced, and as supporting that I have considered that the different factors of value entering into that, a few of them in that connection are:

The completion of the Bay Ridge Channel, the increase of business in the port of New York and of special reference to that section through the increase of exports and imports and the coastwise trade, and that was brought about, or very largely affected by the opening of the Panama Canal, by the appropriation by the State of the Barge Canal Terminal, and also I considered as another factor of value there the fact that the marginal railroad had been laid out by the dock department and authorized by the city administration; I also considered the remarkable growth during these ten years of the Bush Terminal properties; also the fact that through purchase and lease practically all of the property in that vicinity had been taken up; and deducing the result that finally this Langley

297 property was the only waterfront property adapted to the purposes for which this, in my judgment, should be applied without going to too great expense, and that the accessibility and advantages of this property were to be considered with reference to the following factors: Deep water channel, long pier space, adequate space for slips with wide berths for system of warehouses and factories; railroad facilities for receipt and shipment of freight adjacent to terminals; and with local transportations for the accommodations of the public, and especially for labor supply.

Q. Those, in your opinion, are the items that go to make up the value of this property?

A. They are items among others, of course; those are the principal ones in my opinion.

Q. Well, your deep channel applies just as much to Staten Island as it does to South Brooklyn, does it?

A. I don't think it does. It would be more work and expense to get to the channel than it would be at this property.

Q. How much more work?

A. I could not say accurately on that, but I think the dredging from where long piers could with reason be built off Staten Island it is further out to the main channel than it is here.

Q. Do you know how much further it is?

A. No; I do not.

Q. You can build long piers on Staten Island, too?

A. Yes.

Q. Right across the bay practically from here?

A. Yes.

Q. A short distance?

A. Yes.

Q. And if you built these long piers you would be just as convenient for coastwise trade and all these other boats you talk of as you would be in Brooklyn?

298 A. I don't think so. I don't think you would be as conveniently located for the handling of your freight.

Q. It does not make any difference to the coastwise steamer or the ocean steamer whether it comes in on one side of the bay or the other?

A. Not to the operation of the boat, but it does to the management of the boat and its return.

Q. You talk about market value in the light of a willing purchaser from a willing seller. How do you fix that?

A. I fix that from the status of a man who has property to sell and who was willing to sell that property but who does not have to part with it under the necessity of having the funds immediately for any other purpose, and that a purchaser is a willing purchaser; he is one who believes a certain piece of property is adapted to his purposes and yet probably would not be absolutely tied up to that particular property, or might be willing to purchase it as an investment.

Q. That explains what the terms willing purchaser and willing seller are, but does not explain what makes a market value between those two persons. What do you use to measure up your value of that?

A. The purchasers would consider all the points of advantage entering into the location, and the price, and all of the other points that go to make up value.

Q. You say he would consider the price, and the price is exactly what I want you to fix. How do you figure, in other words, what would be the price between a willing purchaser and seller in any particular locality?

A. That would depend upon the property and upon the advantages of the property and the elements that entered into that par-
299 ticular property. You can not say as a general proposition that would be for a property in general. It differs.

Q. Aren't there certain more or less fixed facts from which you spell out its value? Those facts are different in different localities?

A. Yes.

Q. Give me some of those facts.

A. As to what the property is adapted for; what use it can be put to; what property in the vicinity is worth or has sold for; and various elements of that kind. Usually.

Q. Those are the only things you considered?

A. No.

Q. What else?

A. I considered those among other things. A great many things; those different elements I have considered I have given you here are elements of value.

Q. Those elements you have given me here, Mr. Pounds, are elements applicable to water-front property?

A. Well, this is water-front property.

Q. Yes, we will all admit that. Isn't there a definite rule for the measure of value of property in any particular locality? Don't you predicate it upon anything?

A. I say it is predicated upon its use and what it can be made to pay. That is the chief element of value in any property.

Q. You don't think that the price which had been obtained for surrounding properties is any measure of value?

A. Yes, I do.

Q. You have not said that up to now, have you? How much of a part does that play?

A. I think that plays something of an item; entitled to considerable weight.

Q. Entitled to as much weight as the physical appearance of the property?

A. I suppose it would.

300 Q. Now, how much weight do you really think the selling price of property in the vicinity of the property you are appraising has?

A. I think it has a good deal of weight. I cannot tell you just how much.

Q. Do you think it is a determining factor?

A. Not necessarily unless it is in point of time and various other elements right up with the matter you are considering, so that it is analogous and may be properly compared.

Q. What do you fix this value that you have put on this property on? Do you fix it on comparison of sales or your opinion of what the property could be used for?

A. I think there are very few sales have a bearing on the value of this property.

Q. How many?

A. Two or three.

Q. What, two or three?

A. I think the property taken by the city, the Cutting sale, and the Lotus Realty sale should be considered.

By the COURT. How about the Bergen sale?

By the WITNESS. It is entirely different in my judgment, but I should consider that and the surrounding circumstances and the conditions since the time of those sales.

Q. Wouldn't you go a step further and say the sale of property previous to the Lotus Realty Company is to be considered?

A. Yes, any sale right there close I should consider.

Q. The same piece of property a year previous, to a corporation and not to the city. Isn't that just as much a measure of value as the sale to the city?

A. That depends on the circumstances and depends on a number of other things.

301 Q. Do you think that that property sold to the Lotus Realty Company should be taken into consideration?

A. I think in considering a situation like this in a sale as close to the sale of the city as it was, it should be considered.

Q. Do you consider it?

A. Yes.

Q. How much do you think property down there from Fifty-eighth to Sixty-third Street increased in value from 1905 to 1908?

The COURT. Three years?

Mr. BUCHNER. Yes.

A. I haven't considered that, but it certainly did increase very perceptibly.

Q. About how much?

A. From 1905 to 1908 it is a little difficult to determine. It don't seem to me that it is quite the division that the property down there has progressed in as to values.

Q. Where do you make the line of demarkation?

A. It seems to me there are two periods, say from 1902 through four, eight, or ten years, say 1908; and then 1908 on would be another ten years. In considering the percentages of increase of the value of property it is difficult to divide it up just per annum, but it generally does extend over a period or cycle, and you get about such an increase over a certain period, and that varies exceedingly with the factors of value that come into operation during that time.

Q. You think the values in South Brooklyn realty have gone up in two arcs, one from 1900 to 1908 and the other from 1908 to 1918?

A. There is a sort of dividing line in there. It started very late way down in 1902, and of course it was like cutting up your city lots

302 out of a farm—and had increased very rapidly there whenever you could get a unit of value so far as percentages go, then after it got along in 1907 or 1908 it was a different proposition and did not go quite in the same way.

Q. You don't think it was quite the same way in 1907 and 1908 as it had been from 1900 to 1907?

A. No.

Q. Now, how much do you think it increased in value in that first period you have picked, from 1900 to 1907 or 1908?

A. I should think in that period that the price starting as late as that had increased something like five times.

Q. About 500%?

A. Something like that.

Q. From 1908 to 1918 about how much did it increase?

A. I think from 1908 through another ten years it increased 10 to 12% per annum.

Q. That about doubled it?

A. Yes, sir.

(At this point a recess was taken until 2 o'clock p. m.)

AFTER RECESS.

LEWIS H. POUNDS resumed the stand.

Cross-examination by Mr. BUCHNER (continued): *tinued):*

Q. I understood you to say this morning that from 1900 to 1907 or 1908—that is about where you made that cycle, wasn't it?

A. Yes.

Q. There was in your opinion a marked improvement in value between 1907 and 1908, or had the greater portion of that increase taken place before that?

A. I think the greater part had taken place before that.

Q. About how much would you say that the property had
303 increased in value between 1907 and 1908?

A. There is no way of measuring that unless you take the sales to the city in 1908.

Q. Do you think that represents the real logical increase in value?

A. I don't think it was really logical, no.

Q. In other words, you don't think the values increased four-sevenths of the 1907 value in 1908?

A. No, not unless you base it on those sales, the one in 1907 and the one in 1908.

Q. You don't base the growth of value on any such fact as that?

A. No.

Q. In your opinion you would not say that that represented the increase in value in that year?

A. No, I don't think it really did.

Q. About what percentage would you say the values had shown an increase of, basing it on whatever determining factors you used between 1907 and 1908?

A. It is very difficult to determine that. You had a new factor coming in there in 1907 by reason of the city filing a plan for improvements all along the water front and starting—recommendation of the dock department to take that property—and starting condemnation proceedings, so that it is pretty difficult to measure that.

Q. Would you say that increased or decreased the value of the property?

A. I think it increased it.

Q. Do you think the condemnation proceeding at that time increased it?

A. Yes, sir; at that time. Took it out of the market. I think really it increased it.

Q. Do you think the filing of the dock department's proposed plan of the improvement of the water front is reflected in the surrounding upland property in increased or decreased value?

304 A. You mean away from the property they are taking in any proceeding?

Q. Let us take first the property that is close to where the plan is filed. Do you think that the filing of a plan increased or decreased that value?

A. I think it increased the value.

Q. Do you think the filing of any plan by the city for the taking of the property shows an immediate—for the improvement, I should have said about a mile away from property that you were appraising—would you say that would increase or decrease the value of that property?

A. That would depend a good deal on what it was. I think so far as increasing or decreasing is concerned it would be on the side of increasing. Just what the measure is, it is difficult to tell.

Q. If the city had at one time filed a plan for the improvement of this property, including the Langley property, you would say that during the time that that plan was in force and effect this property value was increased?

A. I think its real value would. Perhaps its market value would not, but its real value would.

Q. Would you consider its market value as you have appraised it in this proceeding would have increased?

A. It should not have used the term—perhaps its saleability or its probability of making a sale would decrease. That is, making a sale to outside parties.

Q. When the salability of it has decreased, do you still think that its value had increased?

A. Yes.

Q. That is, its intrinsic value?

A. Yes.

Q. In this value which you place on the Langley property there, do you base that upon its intrinsic value or upon its value according

305 to its saleability in 1918?

A. You can't get away from its intrinsic value or its potential value in my opinion. It is an element of the value.

Q. Listen to me and answer my question. If you can't answer it, say so. In your appraisal of the value of this Langley property that you have made in this proceeding here, have you fixed this appraisal of value upon its intrinsic value or have you taken into consideration its saleability at the time the appraisal was made, 1918?

A. If I understand your question right and what you mean by intrinsic value, I think I would say I placed emphasis on that.

Q. On its intrinsic value?

A. Yes.

Q. Your theory of market value, though, is the price that a willing purchaser would pay a willing seller?

A. Yes; under free conditions.

Q. There was not a very large demand for property as large as this and which required as much money as this to be developed in 1918, was there?

A. Yes; there was in 1918.

Q. Isn't the demand for property that requires expenditures of any sum such as would have been required for the development of the Langley property, for instance, always restricted?

A. Yes.

Q. It is restricted to people who are in a position to expend very large sums of money, is that so?

A. Yes.

Q. Isn't that restricted number of potential purchasers reflected into the value of the property, I mean for the purposes of an appraisal?

A. No; I don't think it does, because here in New York you have a great many concerns and companies who are able to take property of any value whatever, no matter how big, and they are liable to come along any day and want your property.

306 Q. You think there were a large number of concerns of this kind might have bought this property in South Brooklyn for the purpose of developing it in 1918?

A. I don't know as I would say a large number, but some.

Q. In fixing the measure of value which you have placed upon this property, have you taken into consideration the length of time that it would require to put improvements on it before it was interest bearing?

A. I don't think that I specially considered that. It is always the case when one buys unimproved property. You figure you have to develop it in a certain way and you allow for it.

Q. Do you figure the value of this property just as it stood then, or do you figure its value as you figured it would be if it had been improved?

A. I figured it as it stood.

Q. And as it stood then, you figured it was worth $3,685,932.30?

A. I did.

Q. Did you make an estimate of the entire tract and then divide the square-foot area into that, or did you take first the square-foot area and multiply it by your measure of values $2.15 a square foot?

A. I determined in my mind first what I thought it was worth a square foot and then multiplied it by the total number of square feet.

Q. Did you fix $2.15 a square foot—if 81,120 square feet are taken out of it you will admit that your value would be reduced by $2.15 times 81,120?

A. That depends on how it is taken out and what for.

Q. It certainly has to be taken out or your—did you take first the square-foot area and multiply the area by the measure of value?

A. Yes; but if it is something you still have use of it would make a difference.

307 Q. Do you think it would be a fair thing for you to add thirty feet of First Avenue roadbed along the front of this property and multiply it by $2.15 in figuring the gross value of the property?

A. If you take out the streets the property would be worth as much as the total amount before you take out the streets.

Q. Then what you say, Mr. Pounds, actually amounts to this: That if these streets were used as streets you would make a larger value per square foot to the remaining tract?

A. Yes.

Q. Then, also, that means that for every improvement that is put in there you figure the land value as that much more, isn't that so?

A. Yes.

Q. So that wherever improvements have been made the value of these improvements are reflected not only in the cost of the improvements but in the cost per square foot of the area on which they are placed?

A. I think so.

Q. Did you make that sort of calculation on the property which you considered reflected in the Langley property?

A. I did not make the calculation but I had it in mind.

Q. As a matter of fact, Mr. Pounds, isn't your measure of value of $2.15 a square foot a rather arbitrary standard that you have picked?

A. Every price that you put on property as an appraisal is an arbitrary sum in a sense.

Q. Well, in what sense is yours not arbitrary?

A. You have certain things that guide you to a conclusion, and the sum total of those things gives you your amount. That is so, I think, with every appraiser of every property and everything of value.

Q. You said before, as I understand it, that sales prices in the immediate vicinity or territory similar to the property under
308 appraisal and within a period of time that was fairly close, was quite an item in the appraisal of the property, is that so?

A. I don't remember I said just that.

Q. If that is not your idea——

A. As I recollect it you spoke of that as to whether it would increase or decrease values. That is the way it was in my mind.

Q. Now, I don't think you quite understand this last question I asked you. I say that you spoke this morning about the values that were received in sales of property of a similar kind and within a fairly close period of time, as being an element in your calculation as to the value of this property under appraisement?

A. Yes.

Q. I understood you to say then you would not say it was the determining factor but that it had quite some value?

A. Yes.

Q. Is there anything else you can think of, any definite fact, which has as much determinative value as these sales prices?

A. Where a sales price is comparable in time and character of the property, that is probably the most determining factor.

Q. Do you think that when the city's condemnation proceeding to take the Langley property by condemnation for use by the dock department failed, that that was reflected by a slump in the value of that property?

A. I think probably temporarily it did have an effect.

Q. How much would you figure a slump of that sort would amount to?

A. I don't know.

Q. You can not figure that?

A. It usually results more in a dull market than in an actual decrease in the figures.

Q. How much would you figure that the abandonment by the city or whatever you wish to call it, of a plan that had been
309 adopted by the dock department for improving this Langley property would have been reflected by a slump in the market?

A. I don't think it would be reflected by a slump in the value but I think that it would affect the salability.

Q. Does that affect the value?

A. There is quite a decided distinction.

Q. As a matter of fact, isn't market value really made up of supply and demand in land sales as in most other things?

A. And that is just what——

Q. And that is salability?

A. No; supply and demand is just the principal element in this property.

Q. Well, the best docking facilities in the world a thousand miles from any city are not worth a dollar, are they?

A. What is that?

Q. The best docking facilities in the world a thousand miles from any city would not be worth anything, would they?

A. It is a pretty difficult question unless you know the location. It might be a dock up somewhere in Canada where they tied up some way and it might have a value.

Q. If nobody would buy it it has no market value at all, has it?

A. It would be very limited, certainly.

Q. And that would be reflected back in the market value of it?

A. Yes.

Q. If there was a slump in the salability of this property why isn't that reflected in the value of it?

A. Because you have here a special property and you have the special location and even if there was a dull time for one year or

over a period of time you are pretty sure values will come back and even exceed those you had here before. That is the history of real estate in this city.

310 By the COURT:

Q. When you say values you mean the demand will return?

A. Yes.

Q. And the salability will be renewed?

A. Yes, sir.

By Mr. BUCHNER:

Q. But is there any telling when this salability and demand is coming back?

A. No; there is not, I am sorry to say.

Q. Isn't it a fact that the owner of the property would be face to face with the situation he would have to carry a large tract of land and pay taxes and other carrying charges on it, have a large quantity of money tied up in it; is that reflected back in the value of the property?

A. The more you put into property well located, good property, good property with potential value, the more you are apt to get it back.

Q. The more you are apt to?

A. Yes; and do.

Q. But that is not the market value as of a certain date?

A. It might not be.

Q. Have you fixed the value of this property as of April 6, 1918, paying particular attention to conditions as they then were in the real estate market, and of the surrounding circumstances of South Brooklyn, or have you fixed the value of this Langley property because you think it is a unique piece which at some time or other must have been in demand?

A. Both.

Q. How much of your value is made up on the fact that the Langley property being unique is a piece of property which at some time or other must be in demand?

A. I cannot say how much, but that is not necessary.

311 Q. And you have included the prospective value in that in your appraisal of 1918?

A. I don't know—it is its value now. If that property was on the market to-day you would get a good deal more money than that, and probably the next few years it might still increase.

Q. Probably?

A. Everything in the future is probable.

Q. No question about that. Haven't you really allowed to be reflected in this value you have put on it the fact you yourself are persuaded that the Langley property is a particular piece of property which is susceptible of a development which you have in mind?

A. I think I fixed that right at the time, as of that date.

Q. Where did you get any sales prices on which you can base this measure of value that you have put on it?

A. Well, the only sales price that you can get—as I said, there is only two or three cases seem to me pertinent in considering the value of this property, and the only sales are those the city bought.

Q. How about your Bergen sale in 1915?

A. An entirely different kind of property.

Q. Entirely different?

A. In my judgment; yes.

Q. No comparison at all?

A. Well, very little.

Q. You don't think that the measure of value on the Bergen property is in any way binding on your measure of value?

A. I think this property is practically worth twice the Bergen.

Q. Twice?

A. When it is improved as it is now, and hedged in all around.

Q. Wasn't the Bergen property hedged in?

A. That is what I am saying. When it was open it could have been put with some other property and made fit for a different kind of an improvement which may have been different.

312 Q. If the Langley property is worth twice what the Bergen property was in 1912, in 1915 it was worth $2.20 a foot?

A. I am not speaking exactly.

Q. We are trying to get an exact measure of value from you.

A. When I say one property is worth twice as much as another, I don't mean to a cent or a nickle.

Q. How close to you mean?

A. I would not be understood as saying it was just that.

Mr. RIGGS. I object to that.

Q. How closely do you think the actual values are now?

A. I think that that Langley property in April, 1918, was really worth twice what the Bergen property was.

Q. In 1918?

A. Yes.

Q. Not in 1915?

A. Well, now, I don't know that I would be quite so emphatic as of that date?

By the COURT:

Q. In your opinion did the Bergen property increase in value or decrease in value or remain stationary from 1915 to 1918?

A. I think it remained practically stationary.

By Mr. BUCHNER:

Q. From 1915 to 1918. Do you think it had improved any from 1908 to 1915?

A. Oh, yes; it probably did some, but I don't think, due to its location, that it increased in value as fast as some other properties.

Q. Then your theory was that in every different portion of the South Brooklyn water front a different measure of increase applied; is that so?

A. I don't think I would say quite that. It depends a good
313 deal on its surroundings and what is next to it, and how you are going to use it and what it is adapted to.

Q. You could not tell how you were going to use the property. In so far as anybody knew in April, 1918, the Langley estate were going to let that stay there as beach?

A. I don't know.

Q. That is as far as anybody could tell from what was happening there?

A. Yes.

Q. So that you could not tell what they were going to use the property for?

A. You knew within the range of what it was adapted to.

Q. You knew some of the things could be done to it?

A. Yes.

Q. Couldn't a good many of those things have been done to the Bergen property?

A. Some of them, not many.

Q. Do you think it would have been possible for the owners to have gotten permission to build up to the pierhead line of the Bergen property?

A. Possibly they might, but they would not have very much when that was done.

Q. Wouldn't they have had pretty near as much as the Langley property has in their smaller strip?

A. No.

Q. Why not?

A. Because they were hedged in on each side. In 1918, your Kenyon Pier was located there and you could have space between it, and have slip room, and could have made the slip room on the other side; and in addition to that—which I don't think has been taken into proper consideration—the city owned below that property, and you could have made reasonable arrangements for slip room with the city.

Q. You can not do that with other people?

A. You ain't so apt to as with other people, because the city, through its dock department, has its eyes on the proper arrangement of piers and slips.

314 Q. You think other persons would not do that?

A. Not as apt to as the dock department.

Q. How many piers do you think you could put on that small strip?

A. I haven't figured, simply taken the statements which have been made.

Q. Whose statement was that?

A. The statement of Mr. Farley and, I think, Mr. Graham, that you could put one slip on the smaller piece and two on the other.

By Mr. RIGGS:

Q. Do you mean slips or piers?

A. Piers.

By Mr. BUCHNER:

Q. Don't you know you could have put a pier on the Bergen property just as well?

A. Not just as well.

Q. Why not?

A. Because you haven't the room and you haven't the room on the other side.

Q. You have room enough for one pier?

A. It would have to be pretty small, and you would not have slip room; you are hedged right in.

Q. How much slip room do you think you ought to have in a pier?

A. That depends on the width of the pier.

Q. What do you call a small pier?

A. A very small pier would be thirty feet wide.

Q. And you could have put a wider pier than that on the plot?

A. Yes, sir.

Q. You could have built a thirty-foot pier there?

A. I don't suppose they were given permission, but I don't know.

Q. Don't you know under the regulations you could not build anything as small as a thirty-foot pier?

A. I don't know how it was there. In certain places you can. Probably true.

315 Q. Any reason that you could not have built a seventy or one hundred foot pier on the Bergen property if they had gotten permission to go out to the pier headline?

A. I don't know of any.

Q. And as a matter of fact isn't the frontage of the Bergen property practically the same as the frontage of the small Langley Estate property?

A. Yes; very similar.

Q. Do you believe that if the Langley Estate had been assembled together it would have been more valuable than the way it is?

A. I think it would.

Q. You think that would have added to the value of it?

A. I do.

Q. Because it was larger property?

A. Yes.

Q. Why, to be consistent, isn't the fact that one strip is only two hundred and sixty feet and the other six hundred and sixty-eight—why don't you reflect that in your measure of value and give a less price for the smaller than for the larger strip?

A. Because you are considering a different proposition, not similar property and not similar conditions, and with the city property be-

tween you probably could make your adjustment as to piers and slips so that you could use both of them in the best possible way.

Q. You don't think the city property being between adds to the value?

A. It would over that of it being in the hands of a private owner.

Q. But the fact those two strips were in the hands of the city adds to the diminution?

A. I don't think so.

Q. I think you will admit together they would be worth more?

A. Yes.

316 Redirect examination by Mr. RIGGS:

Q. Referring to the character of a pier that could have been built upon the Bergen property, Mr. Pounds, assuming that a seventy-foot pier had been built at the property, how much slip room would it have left on either side pier between the improvements on the north and the south?

A. You would have had the difference between two hundred and sixty and two hundred and seventy and that.

Q. Will you look at the dimensions? Isn't that property only two hundred feet wide up to a certain point?

A. Up to a certain point. I think out at the pier headline it would be two hundred and sixty. It was two hundred feet near the avenue.

Q. Two hundred feet at First Avenue, and two hundred and sixty feet on the pier headline?

A. Yes.

Q. And would that give you in your opinion adequate room for use of slips on the outside?

A. Not for the best use.

Q. What, in your opinion, was the best use to which the Bergen property could be put when it was sold in 1915?

A. For some business that wanted to build a storehouse or factory or something of that kind on the filled in land.

Q. And in order to build such a business or factory what would be necessary at first?

A. Fill in.

Q. Where to?

A. Where it was not filled.

Q. And has that subsequently been done with the property?

A. Yes.

Q. Referring to the sale about which you were interrogated
317 to the Lotus Realty Company from two different owners in 1907, do you know anything of your own knowledge in regard to that?

A. No.

Q. Will you assume for the purpose of my question that a strip one hundred and eighty-five feet wide was sold by the Realty Company of America extending from the westerly side of First Avenue

to the pier headline, to the Lotus Realty Company on that date, at the price of seventy odd cents per square foot? Was that, in your opinion, the true market value of the property of the Lotus Realty Company when assembled?

A. No; not when assembled. It might have been just for a strip by itself.

Q. And is it a fact, Mr. Pounds, that the pendency of condemnation proceedings for property does affect its saleability?

A. It does.

Q. Now, in the sense of market value, does the tendency of such proceedings have any effect upon its market value?

By the COURT. Market value or intrinsic value?

Mr. RIGGS. Intrinsic value.

A. No; I don't think it does on the intrinsic value.

The COURT. Counsel agrees that after the case is submitted a stipulation respecting the validity of the plaintiff's title shall be filed with the papers and that such stipulation shall be a part of the record upon which judgment shall be rendered by this court herein.

Mr. RIGGS. And that if for any reason such stipulation cannot be entered into that the case be reopened for the purpose of
318 having introduced certified copies of these papers——

The COURT. Certainly. If the stipulation is not carried out——

Mr. RIGGS. Mr. Buchner and I may have different ideas of what is a satisfactory stipulation.

Mr. BUCHNER. I am going to move at this time to dismiss the plaintiff's complaint upon the ground that there has been a failure of proof. I appreciate the fact that in an ordinary condemnation proceeding this sort of motion might not have any applicability, but this is not really an ordinary condemnation, it is a special sort of action that has been brought under section 10 of the food and fuel act. All that the plaintiff is entitled to under that act is that, having accepted 75% of the award, is entitled to come into court and to sue for all above that that he may prove was the actual market value of that property on that day on which it was appropriated.

As far as I can see—I really urge this in all seriousness—I don't believe that the plaintiff has made out a cause of action as to that—the measure of value that has been brought out here in the first place runs from two dollars to two dollars and twenty-five cents as the square foot area value.

Now, that is predicated in the four cases on entirely different propositions. The measure of value of Mr. Farley is predicated upon clear hearsay, no proof at all that any of those figures which
he took are actual or that they are correct, or that they repre-
319 sent the actual market value of anything, and, as far as his figuring out what the cost of improvement was and all that sort of thing, it is incompetent, because all we have is it cost so much a cubic yard for these and so much a cubic yard for that, and there is no proof of the size of the building, no proof of a thing of what

the proposed improvements should have been there. He took the income that he said would represent eleven and one-quarter per cent of the property value there, which he has arrived at by certain arbitary standards of figures, to arrive at the value of the land.

While I understand expert testimony is based upon the best judgment of men qualified as experts, still they must pay some attention to the facts and there must be some definite things upon which they can predicate their judgment.

As far as Mr. Porter's testimony is concerned, I think he proved himself on the stand that he used purely arbitrary figures to fix the standard that he has taken into consideration, and not a single fact which he should have taken into consideration fixing its value. He said in the first place he figured in a lot of deals in the eastern district of Brooklyn, and a few minutes later he said it has no reference at all to this; it is just improving his general knowledge, and he kept insisting these sales simply improved his general knowledge and they did not have any specific application at all to it and finally he said the measure of value was the common sense a
320 man used and a real estate expert—a man that had common sense could figure it out without being an expert at all.

The COURT. I think a fair way to sum up his testimony was common sense was an exceedingly important factor in an expert's value of property, the kind of common sense the expert had, not that technical knowledge was not necessary, but that technical knowledge without common sense did not make the expert as helpful a man in giving as trustworthy an opinion as to values as where the expert was controlled by common sense in reaching his conclusion. I really think, Mr. Buchner, I would not be justified in dismissing the plaintiff's case on your motion at this time.

Motion denied.

Mr. BUCHNER. I will simply spread my motion on the record. I except, if your honor please. I don't suppose your honor requires from me at this time a statement of what our position here is.

The COURT. As to the case between the plaintiff and the Government, I understand it is the question of value only.

Mr. BUCHNER. Practically the only question there is.

The COURT. Very well. Now if you will call your witnesses.

321 WILLIAM G. MORRISEY, called as a witness on behalf of the defendant and being duly sworn, testified as follows:

Direct examination by Mr. BUCHNER:

Q. Where do you live?
A. 1806 Caton Avenue, Brooklyn.
Q. What is your occupation, Mr. Morrisey?
A. Real estate broker and appraiser.
Q. How long have you been engaged in that profession?
A. For the past thirty-six years.
Q. Where?

A. For about twenty-five years in Bath Beach and the balance of the time in Montague Street.

Q. All that time within the present confines of the Borough of Brooklyn?

A. Oh, yes.

Q. And your office is located where?

A. 189 Montague Street, Brooklyn.

Q. Have you specialized during that time in any particular type of property?

A. No; all kinds, Mr. Buchner.

Q. Have you paid particular attention to property values in Brooklyn?

A. Yes.

Q. Have you paid attention to the values of water-front property?

A. I have.

Q. And what have you done to familiarize yourself with values along the water front of Brooklyn?

A. Why, I keep a record of all the water-front sales in my office and get my information either from the purchaser or seller and other sources, or from brokers who make the sales. The sales I make myself; of course I keep a record of and endeavor to keep myself generally posted.

Q. You have held office in the Brooklyn Real Estate Brokers Association—is that what you call it?

322 A. Yes, I have been president of the Brooklyn Board of Real Estate Brokers for three successive terms. I am still a member of it, and board of directors, and also a member of the New York Board of Real Estate Brokers, and the State board also.

Q. You have testified before as an expert as to real property values on the water front in Brooklyn?

A. I have.

Q. In what cases have you testified; name some of them, please, and tell us for whom you testified?

A. I have appraised the New York Dock Company property, extending from the Brooklyn Bridge down to the Erie Basin, about two and one-half miles; the Jay Street Terminal; this Army base——

By the COURT:

Q. Are those proceedings in which you have testified?

A. Yes, sir.

Q. That is what I understood the question to be.

A. Yes.

Q. Your answer was you have appraised. You have appraised and testified?

A. I beg your pardon. The New York Dock Company appraisals were made by me on behalf of the city and submitted to the tax department, and the Jay Street Terminal is the same way, and this

Langley property here, this property that was taken for Government purposes, I testified in it two years ago.

By Mr. BUCHNER:

Q. That was before the Army Board of Appraisal?

A. Yes. Most of the others were all in and near water fronts and throughout the city. I testified in many street opening proceedings before the commissioners for the past eighteen
323 years. I probably have been in about two hundred and fifty proceedings for the city of New York, representing them, and many thousand appraisals.

Q. You testified in the Thirty-ninth Street Ferry opening for the city?

A. Yes. I had forgotten that.

Q. Have you acted as real estate expert and made appraisals for any State or public officials?

A. Yes, I have for the State of New York, since nineteen twelve, on all of their barge canal terminals between New York and Buffalo. I have had about thirty different terminals there all along the water front that I appraised for them and arranged the purchase in many cases, what would be paid for them.

Q. Any other public departments?

A. And the city of New York, as I mentioned, in certiorari and street openings and school sites.

Q. Acted as appraiser for any other persons or corporation?

A. Yes. Acted as appraiser for the Title Guarantee and Trust Company, Brooklyn Trust Company, Peoples Bank, Peoples Trust Company, Mechanics Bank, and quite a few attorneys.

Q. Have you been engaged in the sale of water-front property in the Borough of Brooklyn as a principal or as a broker?

A. As broker.

Q. As a broker?

A. Yes, sir.

Q. For how long a period of time?

A. Oh, the past thirty-five years.

Q. Is that as a broker in sales?

A. Yes.

Q. Have you acted as a broker in leases or anything of that sort?

A. No leases.

Q. Only in sales?

A. Yes, sir.

324 Mr. BUCHNER. Do you wish to cross-examine on qualification?

Mr. RIGGS. I will reserve cross-examination until the main case.

Q. You have examined this Langley property in South Brooklyn that has been described here, have you?

A. I have.

Q. When did you examine it with the view to testifying as to its value previous to April sixth, nineteen eighteen?

A. About a month or two prior—that is specifically. About February or March.

By the COURT:

Q. Of nineteen eighteen?

A. Yes, sir.

By Mr. BUCHNER:

Q. Did you then go down and examine it with a view to ascertaining its physical condition and things of that sort to make an appraisal of it?

A. Yes, sir.

Q. Did you examine the property carefully at that time?

A. Yes, sir.

Q. Did you see it again between then and April sixth, nineteen eighteen?

A. Oh, yes.

Q. Did the conditions continue the same as they had been on the occasion of your former visit?

A. Yes, sir.

Q. Can you tell us what, in your opinion, was the fair and reasonable value of that property on April 6th, 1918, and you may assume, if you will, that the area contained in it is 1,714,322 feet?

A. 1,714,322?

Q. Yes.

A. My value would be $1,714,322 for both parcels.

325. Q. That would make a square foot value of about what?

A. It would be just a dollar a square foot.

Q. In making your estimate of value will you tell me whether or not that estimate as to the value of the property would be changed if you assumed the city had the title to Sixty-first, Sixty-second, and Sixty-third Streets as the beds of them would be carried out to the high-water marks?

A. It would not.

Q. And that would include 81,120 square feet?

A. Yes, sir.

Q. The value you say would still be the same?

A. Yes.

Q. $1,714,322?

A. Yes.

Mr. BUCHNER. That is all.

Cross-examination by Mr. RIGGS:

Q. Mr. Morrisey, I believe you mentioned you had appraised for the State of New York in the State barge canal work and mentioned some thirty water-front places you had appraised. Where were those?

A. All through the State. Different places.

Q. Not in New York Harbor anywhere?

A. Yes; the Palmer property at the mouth of Newtown Creek and the East River; the Bradley Terminal.

Q. Do you call that harbor property?

A. Yes; it was on the East River.

Q. You consider any water-front property surrounding Manhattan Island as New York Harbor?

A. I do.

Q. Now, this property you speak of on Newtown Creek is
326 not comparable in any way with water front capable of development for long piers or for shipping?

A. Not for long piers.

Q. Not for property capable of developing for piers of one thousand feet and over?

A. Unless you dredge in, of course.

Q. That is a different class of property?

A. Yes.

Q. I presume that added to your general store of knowledge, but did not help you in any appraisal of property in South Brooklyn?

A. No, sir.

Q. What other appraisals have you made in New York Harbor?

A. One hundred and thirty-fifth Street Terminal on the Bronx side of the river.

Q. That is the railroad terminal, wasn't it?

A. We are using it now for a railroad terminal. It was not then.

Q. What was it then?

A. A part of it a man used for storage of lumber and the other part of it was a three-story brick building about one hundred by three hundred feet.

Q. Where was the pierhead line?

A. There was no pierhead; it was on the river.

Q. That is, the pierhead and bulkhead were coincident?

A. Yes.

Q. That did not help you any in the appraisal of a property capable of being developed in piers 1,000 feet long?

A. No, sir.

Q. Where else have you appraised property in New York Harbor?

A. At Astoria along the East River.

Q. Would you mind pointing it out?

A. That is just north of Bradley's property [indicating on map].

Q. The pierhead and bulkhead lines are coincident there?

A. Yes, sir.

327 Q. So that did not help you any?

A. No, sir; I did not take any of those sales, or rather appraisals, specifically into consideration in this matter.

Q. Where else have you appraised property in New York Harbor?

The COURT. Why not ask him the question which ones he took into consideration?

Mr. RIGGS. I would like by process of elimination to show that he has not appraised anything that has helped him.

Q. Where else?

A. The New York Dock Company's property.

Q. From the Brooklyn Bridge to where?

A. Down to Red Hook.

Q. And what is the pierhead line in front of that property?

A. Why, it varies all the way from four hundred feet to eight hundred or nine hundred feet.

Q. When did you make that appraisal?

A. 1915.

Q. Did you testify in regard to that?

A. No, but appeared before the tax commissioners and gave my appraisal and answered questions.

Q. Were you sworn and examined in regard to it?

A. I don't think I was.

Q. Was that a private sale—a private appraisal for the purpose of the New York Dock Company?

A. Both sides submitted appraisals, the New York Dock Company had theirs and on the other side.

Q. Proceeding further south between Fortieth and Sixty-fifth Streets, Brooklyn, have you ever made appraisals of any property outside of the Langley property for any parties?

A. No.

328 Q. The appraisal of water-front property is a specialty in the real estate business, isn't it, Mr. Morrisey?

A. Why, I don't think that it is a specialty particularly. There are some men who make a specialty of it.

Q. Let me ask you this: Would you buy a piece of water front property upon the estimate of the ordinary real estate man if he had not made a specialty of water front property?

Mr. BUCHNER. I object.

The COURT. Objection overruled.

A. Would I buy it? I am in the real estate business——

The COURT. I think that that question in that form is objectionable. Ruling withdrawn. Objection sustained.

Q. Isn't it a fact that in the real estate world when people desire appraisals of water front property they go to a specialist in water front property?

A. I believe they do, I think they do.

Q. And you would not consider that your appraisal of corner lots or of any other class of property other than water front property aided you any in making an appraisal of water front property, would you?

A. Why, that is all helpful.

Q. It all adds to your general experience and knowledge of real estate conditions, doesn't it?

A. Yes, sir.

Q. But as a specific factor it does not enter into your calculations at all when you come to appraise a piece of water front property?

A. Yes, it does.

329 Q. Do you mean to say when you appraise a piece of property out in Flatbush one hundred by one hundred on a corner that your mind functions at all with anything that you appraised for the barge canal and the terminals?

A. No, sir; there is no comparison.

Q. And there is no comparison between inland and water-front property?

A. No; the purposes are different.

Q. The great difference between inland property and water-front property is that the supply of water-front property is limited, isn't that so?

A. Yes.

Q. And the supply of other property is practically unlimited, isn't it?

A. It depends on how far you want to stretch that. It is limited in certain sections, of course.

Q. No matter how great the demand, the demand can not increase the supply of water-front property, can it?

A. No demand increases the supply.

Q. Are you familiar—have you given me all of the appraisals of water-front property in New York Harbor that you have made, Mr. Morrisey, that are helpful to you at all in this case?

A. I have mentioned those that I have appraised, but as I said I did not take them specifically into consideration as aiding me very materially in the appraisal of this property.

Q. So that it is a fact that prior to the time you appraised this property you had never made an appraisal of water-front property which aided you in making this one?

A. I made the exception, I told you, the New York Dock Co. and Jay Street Terminals.

Q. The New York Dock Company is one and the other one——

A. There is the Jay Street Terminal with its docks.

330 Q. That is a terminal property, just north of the Brooklyn Bridge?

A. Yes, sir; but it is water front.

Q. And used as a railroad terminal for the receipt and discharge of cargoes, isn't it?

A. Yes.

Q. It is not a pier property at all, is it?

A. Yes; they have piers there.

Q. How long are the piers?

A. If my memory serves me they are not very long, about three or four hundred feet.

Q. They are not covered piers, are they?

A. Yes. There is one or two.

Q. No piers at which steamships receive or disembark cargoes, are there?

A. Two of them, not, but I think the other two are.

Q. Is the property——

A. Yes.

Q. Is the property comparable at all with the property say of the Bush Terminal Company here on the South Brooklyn shore?

A. No, it is not—you could not have the same length of piers at all there. You could not make the same improvement in there.

Q. It is not capable of the same use or improvement?

A. No, sir.

Q. So then the Jay Street Terminal appraisal did not help you when you came to this appraisal?

A. Not very much.

Q. And the sole appraisal which really helped you was that of the New York Dock Company from the Brooklyn Bridge to Red Hook; is that a fair statement of it?

A. Yes; more so than the others.

Q. Have you ever made a sale as broker of any property between Fortieth and Sixty-fifth Streets in Brooklyn?

A. Not between those two streets; no. sir.

331 Q. And whatever you know or whatever you have assumed in regard to sales in that locality you have received from other persons, haven't you?

A. My records, as most real estate men do keep a record of every sale and look at it.

Q. I assume, in making this appraisal, you have considered certain sales of property that were referred to, but your not having made any sales yourself in this locality between Fortieth and Sixty-fifth Streets, Brooklyn, by reason of the fact of not having made any sales yourself, you have no actual knowledge of any consideration paid upon any sale that has taken place in that locality?

A. I was not present when the titles were closed, but I do know the considerations have been paid.

Q. How do you know that?

A. They have been sworn to and testified to many times and I have checked some of them up with title companies, who have managed the titles and gotten the consideration.

Q. In other words, you have received whatever information you have gotten with regard to the sales from other persons, have you not?

A. Yes, we have to. Real estate men are all that way.

Q. Now, I notice that you put the same square-foot value upon both the smaller northerly Langley and the larger southerly Langley parcel. Is that correct?

A. Yes.

Q. And that is—is it fair and proper to use the same unit of value in regard to this?

A. Yes.

Q. And is that because of the fact that each one of them is capable of development separately as a whole?

A. Yes.

Q. And each can be used for that purpose?

A. Yes.

Q. What, in your opinion, was the best use to which the
332 property of the Langley Estate could have been put on April 6th, 1918?

A. Why, for a shipyard, the same as Morse, the building of a dry dock or dry docks.

Q. A shipyard the same as Morse and the building of dry docks?

A. The same as Morse and Todd and all the rest of them.

Q. In order to put it to that use it would be necessary to fill it in?

A. Some of it.

Q. And, of course, it would be necessary to fill it in to the bulkhead line, wouldn't it?

A. No.

Q. How far would you fill it in?

A. I would not do the filling, but it would not be necessary to fill in as far as the bulkhead line. As far as the business might expand or require. There is enough upland at the present time.

Q. Assume, for instance, it was to be used for the purpose of a shipyard, you would want to fill in a certain amount of the property, wouldn't you?

A. Possibly; yes, sir; some part of it.

Q. How far would you think that the best use of the Langley property could be made by filling it in to? I mean to what degree?

A. I just told you the best usage there would be for the building of shipyards and repairing it—shipyards.

Q. And you don't think it is capable of a development into what you might call a miniature Bush Terminal at all?

A. It is possibly capable of doing that; yes, sir.

Q. Would that be the best use to which it could be adopted?

A. No.

Q. You think it is more valuable for the purposes of a shipyard than it is for the purposes of commercial development?

A. Yes.

Q. Assuming that you were the owner of the Langley property on the date in question, how far from First Avenue would you
333 have filled the property in?

A. I would leave the property just as it is and put it in the market for any purpose.

Q. Assuming you wanted to develop it for the purpose of a shipyard, how far would you fill it in?

A. I am not a shipbuilder and I don't intend to say how far it should be filled in. I have seen shipyards that had used very little upland and some have more upland. I suppose as the business expands——

Q. Take the northerly parcel, 260 feet wide, and assume that on the date in question, April, 1918, that property had been filled in to the bulkhead line. Would it have been more or less valuable than it was in its state as you found it?

A. The small Langley piece?

Q. Yes.

A. If it had been filled in?

Q. Yes.

A. For a specific purpose that filling in might have added to the value, but I am valuing it as I found it.

Q. But assuming that on the date in question that property, 260 feet wide, was filled in to the bulkhead line. Would your value of it have been greater or less than that sum you mentioned?

A. If I found it filled in I would put a higher value upon the part filled in.

Q. You would put a higher value upon the part filled in?

A. It is improved. In other words, if the improvement is adequate for the specific purpose, I would.

Q. I am not asking you about that part of the land filled in, but that parcel as a whole. Would it have been worth more or less than the figure you appraised it at after it had been filled in to the bulkhead?

A. More for some and less for other purposes.

Q. What is your best judgment?

334 A. I cannot answer it any differently—more for some and less for others.

Q. Aren't you able to give a definite answer upon that?

A. That is a good answer.

Q. I don't think that is a very good answer.

Mr. BUCHNER. I object to that.

The COURT. Do not comment on the testimony.

Q. I want you to value for me that parcel, that 260-foot wide strip, filled in to the bulkhead line as of April, 1918, upon the assumption that the best use you could make of it would be to build long piers there. Would it have been more or less valuable than $472,000?

A. Assuming that to be the very best use, filled in to the bulkhead line, I assume it would be worth the difference, whatever the filling in would cost over the value I have given it to-day.

(Question repeated by the stenographer.)

A. I value it one dollar a square foot plus the cost of the filling.

Q. What I am asking you, Mr. Morrisey, is this: Assuming that you had that property filled in to the bulkhead line and that the purchaser of it states that the best use to which it could be put would be the erection of long piers, it would be necessary to dredge out what you had already filled in?

A. Of course it would; yes, sir.

Q. Because the distance between the bulkhead and pierhead lines is only 600 feet?

A. Around that.

Q. And if it is filled in to the pierhead line it is only capable of development by a pier 600 feet in length?

A. Yes; without crowding in and taking away from what you already—yes.

335 Q. Will you tell me, in your opinion, whether the value of the property would have been more if it had been filled in than if it had been in the raw state?

A. I think it would be better left in the raw state.

Q. So that it is a fact that the property being left in the raw state is capable of development in any variety of ways which the purchaser or owner desires?

A. Yes, sir.

Q. And if it is filled in to the bulkhead line it is capable of development only in one way?

A. And the other way by taking out the fill.

Q. Or by dredging away the fill which you yourself had put there?

A. Yes, sir.

Q. So that the property in its raw, undeveloped state was more valuable than if it had been filled in to the bulkhead line by reason of the fact of the greater potentialities of use that were in it?

A. For the specific purpose I mentioned. For long docks, yes. For other things it might be worth a little more to have it filled in.

Q. We are talking about the value of it as a raw undeveloped proposition. If you were the owner you would prefer to have it in the raw state for sale than to have it filled in to the bulkhead line?

A. If I was the owner I would leave it as it is, and offer it in the market for sale for the best price I could get.

Q. You testified in this proceeding before the Board of Appraisers in regard to the appraisal of the property of Brooklyn Rapid Transit, did you not?

A. Yes sir.

Q. And that property of the B. R. T. you testified in regard to is a little to the south of this property?

A. Yes, sir.

Q. Adjoining it?

A. Yes, sir.

336 Q. And how wide is that property?

A. 225 feet wide and extending from First Avenue to the pier-head line. Over 2,000 feet.

Q. It was filled in to where?

A. Out to the—what would be Narrows Avenue, if extended. Of course Narrows Avenue is closed, as shown by the city map, and from there out they had their piers.

Q. And the point to which it was filled in was about 600 feet from the pierhead line, wasn't it?

A. They had two piers, one about 600 feet and the other about 500 feet at the south end of their property, leaving a basin about 90 feet in between, and a rack extending out to the pierhead line some 600 feet.

Q. What was the total of the amount of square feet in that parcel?

A. The upland I think was 169,875 square feet; the land under water, I think, was 254,611 square feet. That is from First Avenue out.

Q. There was a total square foot area in that appraisal, wasn't there, of 424,486 square feet?

A. I think that is right; I haven't checked it up.

Q. And you valued that 424,486 square feet for land value alone at $1.40 a square foot, didn't you?

A. $1.40 was from First Avenue to where the filling in was and then another unit of value from there out.

Q. I ask you if you made this statement—if you gave this testimony and made this answer before the commissioners of appraisal: "Q. How do you analyze that?"—that is, referring to the B. R. T. property.—"A. In the block bounded by the west side of First Avenue to the pier headline that block contains 424,486 square
337 feet and does not include the bed of Sixty-third Street and does not include the bed of First Avenue. I valued that $1.40 per square foot on an average over all. Upland and land under water. That is equivalent to $594,280. That is land and land under water exclusive of the piers." Did you make that answer to that question?

A. I did, that is my testimony.

By the COURT:

Q. Would that cause you to amplify something you said a moment ago, that that was only to the land down there under water?

A. May I refresh my memory?

Q. Please do.

A. (Witness refers to papers.)

By Mr. RIGGS:

Q. And did you make this further answer to the same question: "The land under water from the existing bulkhead out to the pier headline contains 254,611 square feet which I valued at $1 per square foot, so that my average for all of the land between First Avenue and the pier headline is $1.40."

A. I think that is right.

By the COURT:

Q. When did you give that valuation as your estimate of what the B. R. T. property, so-called, was reasonably worth?

A. About August when I testified, August, 1918.

Q. When did you consider the B. R. T. property worth that amount—in August?

A. In August, 1918.

338 By Mr. RIGGS:

Q. The B. R. T. property was requisitioned in April, 1918, at the same time that the Langley property was requisitioned?

A. That is the value I gave as of that time.

Q. This value you gave was of April, 1918?

A. Yes, sir.

Q. Does that refresh your recollection to the extent that you did use an average unit of $1.40 per square foot on the B. R. T. property, in April, 1918, from First Avenue to the pier headline?

A. Yes, sir; that is true. $1.40 over all.

Q. And that was property which was already filled in to a point where they had two piers extending from the bulkhead to the pier headline, each about 600 feet in length?

A. Yes, sir.

Q. As I have read your testimony it excludes any cost of improvements for piers or racks and is for the land value alone?

A. That was just for the land value.

By the COURT:

Q. That is the immediately adjoining property?

A. It is, but it is improved property, your honor.

By Mr. RIGGS:

Q. You mean it is improved property to the extent it has been filled in?

A. Surely, filled in, and bulkheaded and brought right up as terminal property.

Q. You gave a separate value for all the separate improvements?

A. That was an added value. I mean it was improved as far as the land was concerned with tracks and so forth. It is a highly developed piece for that particular work.

Q. You gave a separate value for each one of these piers and all?

A. Yes, sir.

339 Q. And it was in addition to what you have testified to?

A. My land value was $1.40 over all, exclusive of the buildings.

Q. What, in your opinion, is the narrowest width of pier which is adapted to a commercial development?

A. Why, anything over 50, 60 feet.

Q. Can you refer me anywhere in the city of New York to a pier 50 feet wide which is used intensively for commercial development?

A. Not intensively, but there are piers 50 feet wide.

Q. The modern idea of a pier is to have it wide enough to drive a motor truck down the centre?

A. Yes, sir; and a 50 or 60 foot pier would be wide enough for that.

Q. Where is there a pier you know of 50 feet wide, that is wide enough to permit a motor truck to be driven down the centre of it?

A. There are some in the New York Dock Company.

Q. Isn't it a fact, Mr. Morrissey, that a pier 100 feet wide is considered the least that is necessary by all the shipping authorities to-day?

A. For big steamships; yes, sir.

Q. It is a fact that most of the tonnage of the port is carried in steamships from 300 to 400 feet long, isn't it?

A. Yes, sir.

Q. And those are the steamships you are referring to——

A. For the smaller piece; yes, sir.

Q. Would the value of the Langley property be enhanced, in your opinion, if the two parcels were contiguous?

A. Why, no; I think they would both be worth the same in the market.

Q. That is, the sum total of the square feet multiplied by a dollar would be the same?

A. Yes.

Q. You don't allow anything for plottage in the appraisal of large tracts of property then?

A. No; I didn't add specifically for plotting.

340 Q. Do you not believe in adding plottage? What is your definition of plottage?

A. Well, my experience as a real estate man on the question of plottage is this: I have never yet in all my experience either bought or sold property where it was either in the mind of the purchaser or in the mind of the seller, where they had given any special amount for plottage. I have found on the contrary—for instance, one man wants five and the other man fifty, the one that wants fifty wants it cheaper because he takes the larger tract.

Q. Your answer is to the effect that you at any rate don't believe that plottage is anything entering into the mind of either buyer or seller in a real estate transaction?

A. I think it is in the mind of the purchaser when he looks at the property to suit his specific purpose: "Is it big enough or is it too large?"

Q. You say two pieces of property each of which would be incapable of development to its greatest extent separately are not enhanced, for instance, by putting them together as a whole?

A. To a man, for instance, having a piece of property and he is developing it, to my mind he might want to buy the next one, which would have that advantage.

Q. Assuming a piece of property on the water front which was not wide enough to be developed to its fullest extent, and assume that next to it was a larger piece capable of full development. Would you say with those two parcels combined into one had a greater value than each of the two separately?

A. I would not say it had a greater value; no, sir.

Q. You would not say it had a greater value?

A. No, sir.

341 Q. With the assembling of a piece of property from two different owners, each of whom could not realize the best use of it. Does that add anything to it as a whole?

A. It would be a case of one buying the other out.

Q. Suppose they were sold to a third person instead of one buying the other out?

A. Only for a specific use, that is all.

Q. If the specific use, for instance, was the erection of long piers and improvement of the water front, which was a use impossible in separate ownership, what would you say then?

A. If it was impossible, it might be worth a little more in that case.

Q. As a matter of fact it would be worth a great deal more, wouldn't it?

A. Worth more in a specific case.

Q. How much more—are you prepared to state?

A. The usual term used in condemnation, about ten per cent for plottage.

Q. It would be worth at least ten per cent more, anyway?

A. Say ten per cent more; yes, sir.

Q. Didn't you testify before the board of Army appraisers that the only time you had ever heard of plottage in your entire life was in condemnation proceedings?

A. I said the only time I had ever heard it used.

Q. Let me ask you if you were asked this question and gave this answer before the board of appraisers: "Q. Now, is there not a custom among real estate appraisers that where a single person is the owner of half or more of the lands in a single block that in
342 appraising the value of the single lots you add to the whole a certain percentage for what is called plottage?—A. No, the only time I have ever heard of plottage in the thirty-five years I have been in business is in condemnation proceedings."

A. It was the first time I heard of plottage in condemnation proceedings.

Q. The question was did you make that answer to the question before the board of appraisers?

A. I did, that is true; yes, sir.

Q. Did you make this answer to this question: "Q. And have you never heard of anything like plottage except in connection with condemnation proceedings?—A. That is all I have ever heard of it." Did you make that answer to the question?

A. Yes.

Q. That is not quite correct, is it?

A. It is the only time I heard of it, in condemnation; I never heard of it on the outside at all.

Q. How much, in your opinion, had the South Brooklyn water front appreciated in value between 1908 and 1918?

A. 1908 and 1918?

Q. Yes.

A. Why, about thirty per cent.

Q. Do you mean it had appreciated thirty per cent in 1918 of what its value was in 1908?

A. About what its value was in 1908 to 1915, along in there.

Q. 1908 to 1915?

A. Yes.

Q. Did it remain stationary in value from 1908 to 1915?

Q. Not exactly stationary. I would say that from about 1900—say 1912 to 1916 about ten per cent, and from 1916 to 1918 about twenty per cent, making thirty per cent.

343 By the COURT:

Q. You mean the entire period from 1912 to 1915?

A. (No answer.)

By Mr. RIGGS:

Q. According to these figures it had not appreciated at all in value from 1908 to 1912?

A. No, I think it remained about the same.

Q. And from 1912 to 1915 it went up ten per cent over what it had been in 1908?

A. About to about 1916, from about 1912 to 1916, ten per cent; and from 1916 to 1918 about twenty per cent.

Q. And during the period from 1908 it had not appreciated in value one dollar in your opinion?

A. I would not say that, it had not appreciated in value one dollar. It might be a very low appreciation, not noticeable.

Q. Not noticeable at all?

A. No, sir.

Q. Is that true of water-front property in the rest of the city of New York?

A. I think it is, at least around Brooklyn.

Q. You are not familiar with water-front property in Manhattan?

A. No, sir.

Q. You are not familiar with water-front property of Staten Island?

A. No, sir.

Q. Or not familiar with water-front anywhere except in the Borough of Brooklyn?

A. That is right.

Q. And only familiar with water-front property in the Borough of Brooklyn as far as the appraisals you have testified to here?

A. Appraisals and general knowledge of what is going on in the water front, supply, demand, and everything of that kind.

344 Q. Now, then, Mr. Morissey, assuming that this property appreciated thirty per cent between 1908 and 1918, and that your figure of the value in 1918 is correct, what was it worth in your opinion in 1908?

A. About thirty per cent less.

Q. Well, how much?

A. That would be about $.70.

Q. And that, in your opinion, was the market value of the 668 feet, for instance, of the Langley property, the southerly parcel, in 1908?

A. About that.

Q. About $.70?

A. Yes, sir.

Q. Now, thirty per cent of $.70, the appreciation to 1918, would only amount to $.91 in 1918?

A. Perhaps I should have said thirty cents a square foot.

Q. You think there was thirty cents?

A. I think so.

Q. How much had this property appreciated in value between 1900 and 1908?

A. Why, 1900 and 1908?

Q. Yes.

A. It did not appreciate at all.

Q. It remained stationary between 1900 and 1908?

A. Up to about 1902, I would say, or 1903, along in there, to 1908.

Q. I will conduct the examination and you answer the questions. How much had it appreciated between 1900 and 1908, if you can tell me?

A. Well, the appreciation from 1900 to 1908 would be about ten per cent during that period.

Q. That is, in 1908 it was worth about ten per cent more than in 1900, is that right?

A. I think so.

Q. So that according to that basis the property of the Langley Estate was worth about $.60 a square foot in 1900, is that right?

A. You are working backwards on me, Counsel.

Q. You are an expert, Mr. Morrissey, and used to it.

345 A. I can answer that by saying that whatever the value was in 1900 down to about 1912 it had not appreciated any property down there in my opinion more than about ten per cent, and then from 1912 on the appreciation took effect from there on again.

Q. You have already testified, Mr. Morrissey, that in your opinion, this property was worth about $.70 a square foot in 1908?

A. About that.

Q. And you said, as I understood you, it was worth about ten per cent more then than in 1900?

A. Yes, sir.

Q. And upon that basis of computation it would have been worth in 1900 around some sixty odd cents a square foot?

A. In 1900 it was not worth that.

Q. Then your statement it had appreciated ten per cent between 1900 and 1908 was wrong, isn't it?

A. Yes; there is something wrong about it.

Q. Something is wrong about it?

A. Yes, sir.

Q. Figure it over again and let me know if this property did appreciate between 1900 and 1908?

A. In the first place I have not appraised that in this proceeding for what it is worth in 1900 or 1905 or 1908, but I have appraised it for what it is worth in 1918. That is what I am here for.

By the COURT:

Q. Do you want it understood as preferring not to testify with regard to its value then at any other time than in 1918?

A. I prefer it in that way or within a few years. With regard to 1900 nobody could answer that offhanded, and I would be very egotistical to say so.

By Mr. RIGGS:

Q. And the only values you pretend to be acquainted with
346 in South Brooklyn are around the B. R. T. and the appropriation——

A. That I am prepared to testify here as to.

Q. And you have no experience upon which to base any other values at any other time?

A. I have sales of property prior to 1918 I have knowledge of.

Q. You have said you prefer not to put any value on this property except two or three years around the taking in April, 1918, is that so?

A. I mean that if I were to appraise the Langley property for 1900 and 1908 I would have to start and go over the thing again and go in at 1900. In other words I want to say that the apex in price in this property was 1918 and that the apex price was $1.

Mr. RIGGS. Will you please read Mr. Morrissey's answer to the court as to whether he would prefer not to be interrogated in regard to any other time.

(Testimony read by stenographer.)

The WITNESS. I mean exactly: I can not sit here and give you an actual appraisal per square foot in 1900—I can give you a good idea.

Q. You would prefer it to be within a few years but you don't hesitate to say it was worth only $.70 a square foot in 1908, do you?

A. About $.70 at that time.

Q. You do not hesitate to say that even though you told the court in answer to his question you would prefer not to answer what the value of the property was at any time except within a few years?

A. What I meant to say was I did not want to go back and tell
347 you what the exact price of that property was in 1900. If you are talking about percentages of increase I can answer those questions.

Q. Isn't it a fact you were not acquainted with this property in 1908?

A. I am better acquainted with this property than any man in this room in 1908. I have known it for over forty years, been over it time and time again.

Q. Why is it you are not prepared to tell us what the course and tendency of values in South Brooklyn has been?

A. I can tell you that.

Q. Do you mean you can tell me what it was worth at various times and what the ratio of increase has been?

A. I could say that the property around from 1900 to——

Q. Answer the question. Can you tell me or not what the value was at various times and what the ratio of increase has been between various years?

A. Not accurately, but approximately.

Q. In the same manner you have already done so?

A. Yes.

Q. Now, you know the sale from the Lotus Realty Company to the city of New York in 1908 at $1.10 a square foot, don't you?

A. Yes, sir.

Q. Did you consider that in your appraisal?

A. I did.

Q. You knew of the sale of the Cutting Estate to the city of New York in 1908, didn't you?

A. Yes, sir.

Q. You knew the city of New York in 1908 had offered to buy all of the property on the South Brooklyn shore in the then pending condemnation proceeding at $1.10, didn't you?

A. I did not know they offered to pay $1.10 for all the property on the South Brooklyn shore.

Q. I will limit it to the property in the condemnation pro-
348 ceeding. The Lotus realty property and the Kenyon property you knew of?

A. I knew there were condemnation proceedings on; yes, sir.

Q. And knew the city had offered to purchase the Kenyon and Lotus Realty Company property at $1.10 a square foot, didn't you?

A. At the time of the purchase of the Cutting?

Q. Yes.

A. They were both sold at the same time, the Cutting and the Lotus.

Q. You knew that that sale was passed upon by the Commissioners of the Sinking Fund of the City of New York?

A. I did.

Q. After a public hearing, wasn't it?

A. I don't know about the public hearing, but I know it had lots of publicity and lots of criticism.

Q. When did the criticism come up about it? Let us see what you actually know about it.

A. I remember at the time in 1908 there was very severe criticism which emphasized particularly their paying $1.10 for the Bay Ridge property. They considered $1.10 at that time was a——

Q. No; confine yourself to your own opinion, not the opinion of other people.

Mr. BUCHNER. I submit he asked him to tell him what he knew about this.

(Question repeated by stenographer.)

Mr. RIGGS. I will withdraw the question. Put it this way: When did any criticism of any sale come to your attention first?

A. First in the newspapers.

Q. What date?

A. I don't know the date.

Q. Wasn't that some time in Mayor Gaynor's administration, several years afterwards?

A. No; it was after the sale went through.

349 Q. Don't you know, as a matter of fact, that Mayor Gaynor and Robert Fulton Cutting, the head of the Citizens' Union, were political enemies?

A. No.

Q. Didn't you ever hear of it?

A. I may have.

Q. Aren't you acquainted with the fact that Mayor Gaynor criticised Cutting some years after this sale?

A. I am talking about at the time of the sale.

Q. Did you know anything about this at the time of the sale?

A. Of course I did.

Q. Did you know there was a sale pending?

A. I believe I did.

Q. Why didn't go over and oppose it before the commissioners of the sinking fund?

A. I was not sufficiently interested.

Q. No one else was, were they?

A. That I don't know now.

Mr. RIGGS. I move to strike out the testimony of the witness upon the ground that it appears that he is not qualified to give an opinion as to the value of the property on the date in question.

The COURT. Motion denied.

Mr. RIGGS. Exception.

That is all.

Redirect examination by Mr. BUCHNER:

Q. The question that Mr. Riggs asked you in your cross-examination, Mr. Morrissey, about filling in to the bulkhead line, whether or not that would be any objection to the property if used for a long pier. Do you see any reason why a man who had bought that property for a long pier should first fill in to the bulkhead line?

350 A. Of course he would not. He would be foolish to do it.

Q. And his statements that in its raw state the property would be better fitted for piers than if it had been filled in at the bulkhead line is the same thing as saying if you want to build a factory it would be better to build it on a vacant lot than a lot which had a house on it?

Mr. RIGGS. Objected to as improper redirect examination, as also stating what I did not state. The witness said that.

Question withdrawn.

Q. The statement that was brought out in the course of your cross-examination that in its natural state this property was better fitted for piers than if it was filled in above the bulkhead line is the same thing as saying that any unoccupied city lot can be easier made the basis for a factory than property having a building on it; isn't that the same thing?

A. Yes.

Q. You would have to remove the building first?

A. Yes.

Q. And that is the same situation as if this property had been filled in to the bulkhead line?

A. Yes, sir.

Q. This testimony of yours fixing $1.40 a foot on this property, that has been referred to, you gave before the Board of Appraisers on the B. R. T. property?

A. Yes, sir.

Q. You spoke about having made a separate award for the actual physical appearance of certain improvements there?

A. Surely.

Q. Outside of the actual value of the improvements does the physical appearance of them reflect back in the value of the land?

A. The actual presence of the piers, for instance.

351 Q. Of any improvement?

A. I think it does.

Q. And in that respect do you agree with what Mr. Pounds said, that the physical improvement would be reflected in the value of the land?

A. Yes, sir.

Q. Is that part of the measure you used in the $1.40 value of the B. R. T. property?

A. Yes, sir.

Q. You have been asked something about criticism of the sale and the price from the Lotus Realty Company from the city of New York, and the Cutting Estate to the city of New York? Do you know whether or not any criticism of that price has ever been contained in any judicial opinion?

Mr. RIGGS. I object to that as incompetent, irrelevant, and immaterial.

The COURT. Objection overruled. It is only for the purpose of testing his knowledge.

Mr. BUCHNER. It is only for the purpose of testing his knowledge and explaining what he answered to Mr. Riggs on his cross-examination.

The COURT. Objection overruled.

Mr. RIGGS. Exception.

A. As I remember, Judge Crane made his decison on that, that the property was turned over to the city at a profit in excess of its actual worth of something over $300,000 more than what it was worth.

Mr. RIGGS. I object to that.

The COURT. Strike out the answer.

Mr. RIGGS. I move to strike out the answer.

352 The COURT. Objection sustained. Motion granted.

Q. I ask you whose opinion it was, and what it was, and in what place it was delivered?

Mr. RIGGS. Objected to as irrelevant and incompetent.

The COURT. Objection sustained.

Q. Now, Mr. Morrisey, just one other thing. You have heard a lot here about plottage. Is that a term that is generally used in the real estate trade, that bears a direct, a general meaning?

A. Why, it is a term that is used, plottage—applied, as I have said, at condemnations, never at any other place.

Q. In your statement that you don't figure plottage, do you mean by that that if it became necessary for a certain use of a piece of property, that the adjoining piece be bought and added to it that the acquisition of the adjoining piece would not add a value to the entire property including what had originally been held? Do you intend to take any such stand as that?

A. No.

Mr. RIGGS. I beg your pardon. Will you please repeat the question?

(Question withdrawn.)

Q. Do you mean to take the position, Mr. Morrisey, in answering this question about plottage, that if, for the use of a certain piece of property the adjoining piece of property was found necessary or convenient, that the acquisition of that adjoining piece of property would not reflect back an added value even to the original holding? Do you mean it would not reflect back?

A. Yes.

353 Q. I do not know whether I am making myself intelligible or not. In other words, what I mean is this: If a man has a strip of property which is too narrow to be used to its fullest extent, and if the acquisition of an adjoining narrow strip will make it possible to use the both of them together to their fullest extent, do you or do you not think that that acquisition will add a larger value to the property as one parcel than it would to the two separate parcels?

A. I think it would add to the individual more by having them both together.

Q. Do you think, then, the value of the two parcels as one parcel would be greater than the two separate parcels?

A. I don't think the value would be greater.

Q. What do you mean by value?

A. I mean by value—take, for instance, two properties one adjoining the other, the one man might want the one next door to expand, and then it would be worth more for him to have it for that specific use.

Q. You mean intrinsically it would not be any larger, but he could get more out of it?

A. That is the idea; yes, sir.

Recross-examination by Mr. RIGGS:

Q. Then by value you mean that the total market value of the combined parcels so assembled in a third ownership would be greater than the market value of each of the parcels separately, don't you?

A. In the third ownership?

A. A little more I would assume.

Q. How much more in your opinion?

A. It might be—depending considerably on the class of improvements.

Q. Take the class of improvement—the highest class of im-
354 provement of which water front is capable. Take the class of improvement of long piers, 1,400 feet long, and of warehouses and marginal streets, connected by rail?

Mr. BUCHNER. I object to that. Mr. Riggs is not competent to testify to 1,400-foot piers as being the highest class of improvement of water-front property.

The COURT. Objection sustained.

Q. If the improving was by 1,400-foot piers, as I have described, would you say that the combined parcel would be worth more than the two parcels separately before the combination?

Mr. BUCHNER. I object to that. I don't think that is quite definite enough. If he is going to take a 1,400-foot pier, I think he ought to give the other dimensions so that the witness has something on which to base his opinion.

A. No, I don't know.

Q. I assume in your answers to Mr. Buchner's questions you were referring to water-front property, were you not?

A. I was referring generally to property. About the question of plottage.

Mr. RIGGS. I move to strike out the witness's testimony on the ground it has no bearing on any of the issues.

By the COURT:

Q. In your judgment, do the same rules apply to plottage with respect to property generally as applied to property in respect to water front?

A. Yes, sir.

Mr. RIGGS. That is all.

355 THOMAS HOVENDEN, called as a witness on behalf of the defendant, and being duly sworn, testified as follows:

Direct examination by Mr. BUCHNER:

Q. Where do you live?

A. 214 Hicks Street, Brooklyn.

Q. What is your business?

A. Real estate.

Q. And connected with what firm?

A. Chauncey Real Estate Company, 187 Montague Street.

Q. In what capacity?

A. I am president.

Q. What other offices do you hold in connection with the real estate interests of New York and Brooklyn?

A. Not any at this time.
Q. What did you hold in 1918?
A. Expert to Public Service Commission.
Q. Are you a member of the Board of Brooklyn Real Estate Brokers?
A. I am.
Q. Any other?
A. And of the Real Estate Board of New York.
Q. Do you hold any office in either one of them?
A. I do not. I am ex-governor of the New York board and ex-governor of the Brooklyn board.
Q. And how long have you been in the real estate business?
A. Thirty-four years.
Q. In the Borough of Brooklyn all of that time?
A. All of the time; yes, sir.
Q. You have made a study of the values of Brooklyn and surrounding territory?
A. I have.
Q. Have you made a particular study of the water-front values in the Borough of Brooklyn?
A. I have.
Q. What do you use, Mr. Hovenden, to keep yourself aware of what was happening in the real estate development of the Borough of Brooklyn; what measures do you take?

A. Sales, familiarity with development, changes, expert
356 testimony in several proceedings affecting water front, sales I have been personally interested in on the water front.

Q. You have been interested in sales of the water-front property in Brooklyn as a broker?
A. Yes, sir.
Q. As principle, also?
A. Never as principle; broker.
Q. Over what period of time have you been so interested?
A. Twenty-five years.
Q. You have testified as an expert in proceedings?
A. I have.
Q. Relative to that water-front value?
A. I have.
Q. In what proceedings?
A. Broadway Ferry, the State Barge Canal, the Lowell M. Palmer Estate, Greenpoint; the subway proceeding at the end of Joralemon Street, the taking of water front; the proposed acquisition of the property in this case by the city of New York in 1912, I think, and the Morse Iron Works and Drydock property just to the north of the property in this case, in tax certiorari proceedings; acquisition by the city of New York of the South Brooklyn Market; Thirty-fifth, Thirty-sixth Streets, New York Bay; for the United States Government in its taking of the Army base at Bay Ridge.

Q. That last is the proceeding before the Board of Appraisal in which you testified among other things to the value of the Langley property?

A. Yes, sir.

Q. That is the same property as here?

A. Yes, sir.

Q. You know the description of it?

A. I do.

Q. It is the same as Mr. Graham gave?

A. Yes, sir.

357 Q. Will you tell us what, in your opinion was the reasonable market value of that property on the 6th day of April, 1918, and you may assume in fixing that value that the entire area is taken into consideration?

A. $1,776,300 for the two parcels with the improvements thereon.

Q. Was that, in your opinion, the fair and reasonable market value of the property as it then was?

A. It was.

Q. If it should appear, Mr. Hovenden, that the city had the right to the bed of Sixty-first, Sixty-second, and Sixty-third Streets, extending from the west side of First Avenue to the high-water mark, and that the area contained in the beds of the streets, as so laid out, amounted to 81,120 square feet, would that, in your opinion, change the value of this Langley property?

A. It would not.

Q. You would still say that the value which you just placed on it——

A. Would be reflected back into the balance of the land.

Q. And when did you look at this land for the purpose of making this appraisal?

A. For this appraisal?

Q. Well, I mean for making an appraisal as of April, 1918?

A. I think in March, 1918, and subsequent thereto.

Q. And you knew the appearances and the physical condition of this land in April, 1918?

A. I did.

Q. And it is upon that and upon your experience you have based the appraisal you have given us here to-day?

A. Yes, sir.

Cross-examination by Mr. Riggs:

Mr. Riggs. I desire to call the court's attention to the fact
358 that the experts for the plaintiff and for the Government are in entire accord upon this question of the city's streets and it apparently makes the decision of the point involved before practically immaterial. It would seem to me, your honor could take the position that, inasmuch as the experts testified for both sides and it was apparent that the city had been compensated for what-

ever interest they had, that the question need not be determined. Of course, I will leave it for your honor's discretion——

The COURT. I have nothing before me.

Q. Mr. Hovenden, we have met several times before in regard to this property, haven't we?

A. We have.

Q. You testified for the city of New York in 1912 in regard to it?

A. I did.

Q. And you adopted a different unit of value from all the other witnesses?

A. I adopted a different way of valuing water-front properties, in its raw, virgin state.

Q. You value it in its unimproved or raw state by the linear foot, not by the square-foot method?

A. I do.

Q. And I assume your linear-foot valuation here is used the same as it was before the board of appraisers, of $1,900 a front foot?

A. It was.

Q. And your testimony as to the value of the property in 1912 before the Commissioners of Appraisal of the city of New York was $1,300 a front foot?

A. I believe that is right.

Q. So that, in your opinion, according to these two appraisals, the value of this property had appreciated at least 45 per cent
359 between 1912 and 1918?

A. Yes, sir; $1,900 to-day and it was $1,300 in 1912.

Q. And that is an appreciation of about 45 per cent?

A. Yes, sir.

Q. And that appreciation took place in those years?

A. That appreciation has taken place, I think, in the last six years.

Q. Isn't it the maxim among real estate men that property must appreciate about 10 per cent per annum in order to make it worth while to carry it, to the owner?

A. Approximately that.

Q. If it does not appreciate 10 per cent per annum the owner does not get back the interest and the taxes he pays carrying it?

A. He is not apt to.

Q. How much did it appreciate between 1908 and 1918?

The COURT. The Langley property?

Mr. RIGGS. Referring to the Langley property.

A. Approximately from 20 to 25 per cent.

Q. I think you misunderstood me. How much had it appreciated in the ten years from 1908 to 1918? Let me refresh your recollection. Didn't you testify before the Board of Appraisers that, in your opinion, the city property, which is in between the two pieces of the Langley property, had appreciated at least 60 per cent between 1908 and 1918?

A. I don't recollect that I testified to 60 per cent. My recollection is it was from 50 to 60.

Q. Now, I think you were being questioned by Mr. Nehrbos, assistant corporation counsel, and were you at that time asked this question, and did you make this answer before the Board of Appraisers in regard to the city property——

360 The COURT. When?

Mr. RIGGS. Before the Board of Appraisers in 1918.

The COURT. In connection with the taking over of this property by the Government?

Mr. RIGGS. Yes, sir.

Q. "Q. Now, how much, in your opinion, has this property increased in value from March, 1908, to May, 1918? What percentage of its value in March, 1918, has been added to it during that period?—A. About 60 per cent, I should think."

A. That may be correct. I don't quite recollect it that way. My recollection is I said 50 to 60 per cent.

Q. You don't dispute you gave the answer at that time?

A. Mistakes are made even by stenographers, competent as they may be. Mine is recollection.

Q. That would be computed in this way: Assuming the value of the property in March, 1908, was a dollar, that would mean in 1918 it would be worth $1.60?

A. On that basis.

Q. That is, starting with the premise of that?

A. Yes, sir.

Q. But you start with a different premise, I understand it?

A. I did.

Q. In your opinion has it been a profitable investment for the Langley Estate to hold this waterfront property since 1908 in that vicinity?

A. No.

Q. Do you think the Langley Estate would have done better to have sold it rather than hold it?

A. I do.

Q. And you base that upon the fact you don't believe it has appreciated more than 60 per cent during those ten years?

A. I do.

361 Q. And do you believe it appreciated gradually, about 6 per cent per annum?

A. Appreciation comes spasmodically in a property of that kind.

Q. According to the temporary demand and supply?

A. Surely.

Q. What is your idea about the way with appreciation has come about?

A. Well, roughly, from 1900 to 1915, you would get an appreciation of 30 to 33⅓ per cent. We get the balance from that time on. But the greater part of it has come in the last three years.

Q. The greater part of it has come in the last three years?

A. In the last three or four years; yes, sir.

Q. When you testified in 1918 you sincerely believed that there as an increased demand for property of this kind, did you not?

A. Undoubtedly.

Q. And you also sincerely believed that that increased demand as temporary, didn't you?

A. I believed we were then at a time when there was an abnormal emand for water front, due very largely to the war conditions; hat there was an unusual condition then that would not continue o last. That condition does continue, but a time will come, I believe.

By the COURT:

Q. In your judgment has there been an appreciable lessening of alues in water front properties in the New York Harbor since April, 918?

A. No, to the contrary, your Honor. I think there has been an ppreciation since 1918.

Q. You think it is short-lived and there will be a drop?

A. I think it is going to continue for a while to come, but I do believe this: We have an era of prosperity now that is leading
62 American people to live beyond their means, and trouble is to be expected eventually from this, and the stagnation will vertake us.

Q. Would you state such a condition you have outlined would ustify a conclusion that water front property in April, 1918, is not real value equal to the price at which it may be sold during such period of inflation, if you can use that word?

A. I believe that water front property in this port probably ould have been sold for considerably more money than I believe it is orth, since April, 1918. In other words, there has been a decided ppreciation in the water front value since April, 1918.

By Mr. RIGGS:

Q. Before the commissioners of appraisal you were asked this ques- ion and answered in this way at that time, did you not: "Q. What ave you considered that demand to be?—A. Very abnormal at this ime, with the probability that at the end of this war, which no one an see, that the demand will recede, and recede very rapidly, as ompared with the present abnormal conditions."

A. That was my opinion in 1918.

Q. And the experience of the last two years since the conclusion f the war has shown to your own satisfaction that you were wrong?

A. My conclusion is this, if counsel please: Since 1918 there has een an abnormal condition obtaining in the labor and material narkets, but little labor and little material could be had for im- rovements in a large way. There has been an abnormal demand or the use of piers and water front properties for shipping purposes.
63 This would not have occurred if the previous improvements had been finished. I do not think that this condition can continue, or that it will continue.

Q. But in your opinion the demand itself was going to slacken very rapidly at the conclusion of the war?

A. I believed it was, and I believe that condition is going to come.

Q. But we both agree it has not come as yet?

A. Yes, sir.

Q. And, as a matter of fact, since you gave your testimony the demand has considerably increased and is at the absolute peak at the present day?

A. I would not say it had materially increased. The demand was great, even to the abnormal, then. The demand is still here. They have not been able to finish those proposed improvements and turn them over for use.

Q. Isn't it a fact that at the present time there is the greatest demand for waterfront property there has ever been in the harbor of the city of New York?

A. I don't think it is any greater to-day than it was a year ago.

Q. Whatever it is to-day or a year ago, it is greater than it was in April, 1918?

A. Yes; I think that is true.

Q. Now, you have been familiar with this property a long while?

A. I have.

Q. You have been familiar with the Brooklyn shore a long while?

A. I have.

Q. And you have repeatedly testified in your opinion the best development to which this property could be put would be, as you termed it, a miniature Bush?

A. That is right.

Q. Now, by miniature Bush I assume you mean the improvement of the property with concrete loft buildings, and warehouses on the upland and long piers capable of intensive commercial development?

A. Yes, sir.

364 Q. Connected by rail?

A. By rail.

Q. And covered piers at least 100 feet in width?

A. Yes, sir.

Q. You would not advocate the construction anywhere of a pier less than that in width?

A. I would if necessity required it by reason of the restrictions in the size of the land.

Q. It does not here?

A. It does on the smaller parcel if it had to be developed by itself.

Q. Do you mean to say on the smaller parcel you could not erect a pier 100 feet wide?

A. It might be interfered with.

Q. Now, the witness' attention is called to Exhibit T, and I call your attention to the proposed layout of a pier 100 feet wide upon the northerly parcel of the Langley property about which we are talking. That leaves a strip of room between the proposed Langley

Pier, or better still, the possible Langley Pier, and the Kenyon Pier of at least 208 feet?

A. 206 odd feet.

Q. 208. At the bulkhead line 208, and out farther 206?

A. Yes, sir.

Q. And that leaves you 58 feet for a strip on the outside of the pier on your own property, does it not?

A. It leaves 58 feet at the southerly end.

Q. Wouldn't you, as a real estate man, count upon a reasonable degree of co-operation from the city of New York in the way it used this property?

A. I would expect it, but you will see "adopted by the dock department of the city of New York," and on that I would——

Q. As a matter of fact, you know, of course, there was no plan for the improvement of this property existing in April, 1918, when it was taken, don't you?

A. I don't think there was. I think the plan had been withdrawn and abandoned.

365 Q. And the plans that were talked about in the condemnation proceedings had been revoked and abandoned by the city of New York?

A. Yes, sir.

Q. In so far as the city of New York is concerned, let alone the owner, the owner was free to improve that property and do anything with it he saw fit?

A. Any way he saw fit, subject to the regulations of the dock department of the city, and the rules of the Government.

Q. Do you assume that the dock department would regulate the width and extent and location of piers upon this property?

A. They often do dictate to you.

Q. Did you assume that in making your valuation?

A. I did not depreciate the value of this property because of any such demand, but I had in mind the erection of a pier possibly 70 feet in width would leave me undisturbed with two adequate slips on either side of a narrow pier.

Q. And the reason for the rejection of the improvement is yours would be 70 and ours would be 100?

A. Yes.

Q. With that difference between us, what would be your idea as to the best length, or the most advantageous length of the pier?

A. About 1,200 feet.

Q. This plan, Exhibit T, which I have called to your attention, calls for a pier of about 1,400 feet. Is that, in your opinion, too long?

A. That is a matter of opinion, is a difference of opinion between users of property of this kind as to whether the demand required 800 or 1,000 or 1,200 or 1,400 foot piers.

Q. Look at it this way. Most of the tonnage of this port is carried in ships three to four hundred feet long.

A. Three to five hundred feet long.

366 Q. With a 1,200-foot pier you could only get two of the ships on the one side?

A. Three 350-foot ships in there.

Q. And if 400 feet, you could get ships, nose to nose, three 400-foot ships?

A. It would not be possible to berth them.

Q. If you had 1,400 feet, it would be?

A. Yes, sir.

Q. As a matter of fact, by extending your pier only 200 feet you would be able to accommodate almost an extra row of vessels?

A. My object was to have a little more upland for building these warehouses.

Q. That is a matter of personal preference?

A. Yes, sir.

Q. But if persons in whom you had confidence as to their judgment said the best way to lay out a miniature Bush would be to have a pier 1,400 feet long and then a marginal street 100 feet wide, you would not disagree with them?

A. No, sir.

(At this point an adjournment was taken until May 13th, 1920, at 10 o'clock a. m.)

BROOKLYN, *May 13th, 1920—10 o'clock a. m.*

TRIAL CONTINUED.

THOMAS HOVENDEN resumed the stand.

Cross-examination by Mr. RIGGS (continued):

Q. Mr. Hovenden, last night, just before we adjourned, to refresh your recollection, we were talking about the capabilities of use of the property, and I think you said that you would advo-

367 cate the erection of what you have already termed in other proceedings a miniature Bush upon the property?

A. Yes, sir.

Q. And that you would advocate the erection of piers about 1,200 feet long but if other experts suggested they ought to be 1,400 feet you would not quarrel with them?

A. No, sir; that is a matter of opinion.

Q. It is a matter of opinion as to the best use of a pier and the number of ships that can be loaded and unloaded at once.

A. Yes, sir.

Q. When you say the best use of a property, I presume you mean the most valuable use of it?

A. I mean as good a use as can be made of any property.

Q. And a use which would bring the most return to the owner or purchaser?

A. Would bring as good or better return than any other use.

Q. Assuming that this is the best use to which the property could be put, if you had been the owner of that property, would you have

advocated filling it in to a point, say, 400 feet beyond the westerly side of First Avenue?

A. No, sir.

Q. And you would believe that the property that was in a raw state—or at least that the property in a raw state would be more valuable than it would if it was filled in to the bulkhead line?

A. I believe if in the market, or offered for sale, the property would sell as advantageously in the raw state as if you charge it with the improvement and the filling in.

Q. The reason is, if you should fill it in to the bulkhead line you would, as a matter of fact, destroy its capability of the best use to which it could be put?

A. Not me, but in the mind of another user.

Q. That is your personal opinion?

368 A. That is my personal opinion based on my judgment in endeavoring to sell water-front property and getting the different minds of different buyers for different uses.

Q. That is where property is capable of development in a variety of ways to suit the desire of the purchaser that it is usually more valuable than where the nature of the improvement is already fixed?

A. Yes, sir.

Q. Now, do you recall the testimony that you gave in regard to the value of the B. R. T. property adjoining this property?

A. I do.

Q. Will you describe that property?

A. The B. R. T.?

Q. Yes.

A. That is, a water-front block only—not the adjacent property?

Q. I mean, describe the property between the westerly side of First Avenue and the pierhead line immediately adjoining the Langley property, which you valued in 1918 for the Board of Appraisers.

A. That took in more property than that one block, you recollect, Counsel. That is why I wanted you to specify distinctly. The B. R. T. owned black No. 5804 on the Kings County assessor's map, described as being on the westerly side of First Avenue running to the pierhead line of New York Bay, beginning at the southerly line of Sixty-third Street and running to a point 25 feet south of the northerly line of Sixty-fourth Street, if extended.

The COURT. Is this Kings County assessor's map the one that is in evidence?

Mr. RIGGS. I am not sure about that.

The WITNESS. This is the block immediately south of the Langley property; stands right here [indicating]

369 By the COURT:

Q. You have referred to a map, and I wanted to find out whether that was the one that was in evidence?

A. Here it is [indicating on map].

By Mr. RIGGS:

Q. How wide was it?

A. 225 feet by 1,870 feet.

Q. And had it been filled in at the time of the appropriation?

A. That property had been probably filled in.

Q. To how far?

A. It had been filled in to the Bergen bulkhead line as established, with two piers beyond. My description of the property gave upland area of 169,875 square feet, with land under water 254,611 square feet, a total of 424,486 square feet in the plot.

Q. And that property at that time was incapable of development by long piers or for the purposes such as the Langley property, isn't that so?

A. It was, unless it were excavated again.

Q. Unless the filling to the bulkhead line were excavated?

A. Yes, sir.

Q. What was the valuation you placed upon the land of that property, regardless of the improvements?

A. $637,715.

Q. That makes an approximate square foot value or result of about $1.51, doesn't it?

A. I think about $1.51.

By the COURT:

Q. Did you value that on the square-foot basis?

A. I checked that two ways, if your honor please; I figured this B. R. T. at $1,900 a linear foot, and then conceded to it the added value by reason of the fill, and then extracted a square-
370 foot value, and checked back the two, one against the other.

Q. Was this an unusal course of procedure on your part——

A. Unusual? No.

Q. To appraise it on a square-foot basis?

A. No.

Q. I understood you to say your customary practice was to appraise by the linear foot?

A. For virgin land. If the land is improved, then I figure it the other way.

By Mr. RIGGS:

Q. That method is peculiar to yourself, isn't it, Mr. Hovenden?

A. In a measure; and yet it is something I have absorbed from different men who were in the trade before I was.

Q. Let us see how that works out in regard to the Langley property. Do you remember testifying in 1912 that this property was worth $1,300 a linear front foot?

A. I do.

Q. And at my request in that proceeding you, for the benefit of the commissioners, made the necessary computations to arrive at the square-foot value you had given, did you not?

A. I did.

Q. And that computation resulted in the figures that you appraised the northerly Langley parcel at, the former parcel, of about 72 cents a square foot?

A. Approximately 72 cents.

Q. And your figures for the southerly parcel came out about 69 cents a square foot?

A. I think approximately 70 cents, due to the fact the southerly piece was a little longer.

Q. Were you asked this question, and did you make this answer on that proceeding:

"Q. Therefore, under your valuation of this property the
371 largest part remaining, consisting of the two blocks between Sixty-first and Sixty-third Streets and First Avenue and the pierhead line is not worth as much a square foot as the 118-foot strip which is taken in this proceeding?

"A. By a small fraction it would seem not to be, due to the fact of its being a little longer, which adds nothing material to the value of the property.

"Q. So that your linear-foot method does not take into consideration at all that the property is deeper as it approaches Sixty-third Street?

"A. It is a little deeper, and the linear-foot method eliminates that question in these proceedings."

A. That is true; the difference is only fractional.

Q. It is true you gave those answers, and your computation is the same to-day?

A. It is. The difference is only fractional.

Q. Now, for instance, Mr. Hovenden, will you assume for the purpose of my question that the grant of the Langley estate instead of extending to the pierhead line only went to the bulkhead line, or what was the pierhead line of 1857? What, in your opinion, would it be worth a linear foot?

A. I think it would be worth just the same money, for the reason that no one else but an abutting upland owner could ever get that grant from the State.

Q. You assume that under the law of this State no one but the riparian owner would have the right to get the additional grant?

A. He never could get it.

Q. No other person could get it?

A. No other person could get it.

Q. And you assume the matter of title to a plot of land, say, 668 feet wide and 633 feet long, would make no difference at all in your estimate of value?

A. No; not virgin land as this is located, and as I understand
372 the law in the State of New York, which is that no outside person can get any grant, unless he is the abutting owner.

Q. Don't you know the abutting upland owner has no right to make use of the property unless he has such a grant?

A. He can get such a grant.

Q. Don't you know he can only get such a grant upon the appraisals of the State experts of the commissioners of the land office?

A. I do.

Q. Do you recall the property of the William R. Grace Company at the foot of Conover Street?

A. Yes, sir.

Q. Grace & Company made application for a grant from the commissioners of the land office about 1912, didn't they?

A. I don't know.

Q. If you don't remember the year, you must remember the occasion?

A. I remember there was an application for a grant.

Q. You remember the W. R. Grace Company desired to make certain improvements on their property?

A. Yes, sir.

Q. And they did not have the grant of the commissioners of the land office extending to the pierhead line, which would permit them to make those improvements?

A. I have a hazy recollection there was a question raised, and an application was made for an extended grant by the William R. Grace Company at the foot of Conover Street.

Q. Do you know, as a matter of fact, that the State appraisers appraised that land for the purposes of the State grant at 50 cents a square foot?

A. No.

Q. Do you know that that was what the W. R. Grace Company had to pay for it?

A. I do not.

Q. Would it refresh your recollection if you looked at this
373 copy of the minutes of the meetings of the land board [handing paper to witness]?

A. I have never seen this copy before, Counsellor.

Q. You don't dispute the fact, do you, Mr. Hovenden?

A. I have no reason to dispute it or to admit it.

Q. If the land of the William R. Grace Company, of which they desired to get a grant extending from their own property to the pierhead line was appraised by the State at 50 cents per square foot and they paid that amount, there was a material advantage as to whether their grant went to the pierhead line or not, wasn't there?

A. It would seem so.

Q. You are familiar with the property I am speaking about, of the William R. Grace Company at the foot of Conover Street?

A. Yes, sir.

Q. How would you say that property compared with the Langley property, for instance, in value?

A. There was more upland area in the Grace Company property and less land under water, and the improvements——

Q. Confine yourself to the nature of the lands under water in front of the property. Is there anything similar in regard to the property?

A. Deeper water at the Grace Company property than there was at the Langley.

Q. What would you say as to the comparison between the lands under water or on the pierhead line on the Conover Street property and the Langley property?

A. The pierhead?

Q. Yes.

A. As to the question of value?

Q. Yes.

A. I would think that the Grace Company property was more valuable.

Q. Well, now, haven't you got a method of valuing the upland as worth three times what the land under water is?

A. Usually.

374 Q. Isn't it a method you have adopted in the past?

A. Yes, sir.

Q. Under that method didn't you appraise the property between the bulkhead line of the B. R. T. property and the pierhead line of the B. R. T. property at 55 cents a square foot?

A. I did.

Q. And that is just exactly the same character of property there is at the Langley property?

A. In a measure, yes; as to the outer part of the Langley property.

Q. You don't know, or undertake to say, what the State appraisers would value a strip of land between the bulkhead line and the pierhead line at for the purpose of making a grant?

A. I do not.

Q. But you are satisfied from the minutes of the commissioners of the land office that something would be charged, aren't you?

A. Something has been charged and it has been in many places only a nominal charge, and in other instances under other administrations a substantial charge.

Q. How about the last few years?

A. In the last few years I believe they charged them.

Q. In the last few years they charged the whole appraised value of the property?

A. I don't know about that. My understanding is it is mutually agreed upon, or arrived at, at the hearings of the State board.

Q. And if the Langley Estate did not own the property between the bulkhead line and the pierhead line, in order to use the property between the bulkhead line and the pierhead line, it would be necessary for them to get such a grant?

A. Yes, sir.

Q. And it would be necessary for them to get a grant on the
375 southerly parcel alone 668 feet in width and 633 feet in length, wouldn't it?

A. I think that is right; yes, sir.

Q. And that property between the bulkhead line and the pierhead line you appraised yourself before the commissioners of appraisal at 53 cents a square foot?

A. I did.

Q. Before we drop that subject I would like to have you point out to the court where this property of the W. R. Grace Company at the foot of Conover Street is on the map?

(Witness does as requested.)

Q. The W. R. Grace Company property had no rail connection at all anywhere?

A. Not directly; no.

Q. How did they have indirectly?

A. Over the sides, by truck——

Q. By car floats?

A. Yes; and by trucking to the New York warehouses.

Q. You don't recall trucking a New York rail connection?

A. Yes.

By the COURT:

Q. Any property has indirect rail connection in that sense?

A. What I mean is, it is a short haul to the freight terminal of the New York Dock Company.

By Mr. RIGGS:

Q. You know what I mean when I say the property has no direct rail connection?

A. It has no siding.

Q. And there is no way of getting one in there?

A. No way of getting one in there. There is one proposed by the city to come to that property eventually.

376 Q. That is the marginal railroad Mr. Pounds spoke of?

A. Yes, sir. That is to come to that property.

Q. I believe you said at one time that the Bush Terminal plant was the only modern industrial plant in New York?

A. The most modern, most up-to-date, and probably the most progressive plant of its kind in New York.

Q. And as a matter of fact, there is not any other place in the harbor of New York other than the Langley property where even a miniature Bush Terminal could be erected, is there?

A. Yes; there is.

Q. Where?

A. Staten Island.

Q. You don't know anything about Staten Island, do you?

A. Not particularly, only indirectly.

Q. What did you mean by saying "only indirectly"?

A. I made no study of Staten Island, but I know plans have been proposed at Greenvale in Jersey City and at Staten Island for plans similar to the Bush.

Q. What advantages has Bay Ridge to Staten Island in your opinion?

A. In a sense on the land as against being on an island.

Q. In other words, Staten Island is an island?

A. Partially. The Greenvale section would be on the mainland.

The COURT: In Jersey?

The WITNESS. Yes, sir.

The COURT. It would not have the same shipping facilities that South Brooklyn would have?

The WITNESS. Greenvale will eventually have as good, or better facilities than Brooklyn, for the reason they will get more trunk railroads.

377 The COURT. Won't there be a great deal of dredging to be done?

The WITNESS. Yes, sir. Part of that has been done.

By Mr. RIGGS:

Q. Will you look at this map and point out to the court where you are talking about when you say this Greenvale section?

A. The Greenvale comes up in here somewhere [indicating on map].

Q. What is the depth of water in front of the Greenvale section?

A. It is low now.

The COURT. It would be a very expensive dredging proposition?

The WITNESS. Yes, sir. But that is a proposed improvement in the port that is coming; it is proposed by the railroads jointly, I understand it.

Q. As a matter of fact, that property was not ripe for immediate development in 1918?

A. No, sir.

Q. And the Langley property was ripe for immediate development?

A. It was, if you could have gotten the labor to develop it.

Q. Aside from what we could have gotten, the property itself was ripe for development from demand and supply?

A. Yes, sir.

Q. Any comparison at all between the Greenvale section and that?

A. I would not compare them.

Q. As I understood you to say, you are not familiar with the physical conditions of the water front around Staten Island?

A. Not particularly.

Q. You know nothing of values there?

378 A. I make no pretense of knowing values on Staten Island.

Q. And that applies also to Manhattan Island?

A. It does; as I specialize in Kings County.

Q. And the only portion of the harbor you claim to be familiar with at all is Kings County?

A. My real familiarity of values applies to Kings County.

Q. Are you familiar enough with the physical conditions of Manhattan Island and Staten Island and the other parts of the water front to say whether or not there is any other available site which could be improved into what you call a miniature Bush Terminal with piers, say, 1,400 feet long?

A. Comparable with this?

Q. Yes, sir.

A. I think not.

Q. That is a particularly desirable site, isn't it?

A. A very good site.

Q. And you know, as a matter of fact, that this site was selected by the Secretary of War upon the recommendation of the Chamber of Commerce of the City of New York?

A. I believe that is true.

Q. And you know also that the recommendation was made after comparing it with all other possible sites in the harbor?

A. I assume that to be the fact.

Q. Now, Mr. Hovenden, will you please state for me what you believe to be the value of a lot situated on the west side of First Avenue about 20 feet wide or 25 feet wide and 100 feet long?

A. On the west side of First Avenue?

Q. Yes.

A. At what point, please?

Q. Well, say above Sixty-second Street?

A. $3,500 to $4,000.

Q. $3,500 to $4,000?

A. Yes, sir.

379 Q. How much would such a lot be worth on the easterly side of First Avenue?

A. A little less.

Q. Say, $3,000?

A. Fractionally less.

Q. Didn't you testify before the board of appraisers that such a lot was worth approximately $2,400?

A. A little farther north; yes.

Q. You think it is more valuable as you go farther south?

A. I did not say that.

Q. Didn't you testify in August, 1918, before the commissioners of appraisal such a lot, in your opinion, was worth $2,400?

A. On the east side of the street?

Q. Both on the west and east side of the street?

A. I—may I refer to my recollection?

Q. You may.

A. Twenty-foot lot on the east side of the street I established a unit of $2,400 for a 20-foot lot, not 25.

Q. Confine my question to a 20-foot lot, would your answer be the same?

A. Yes, sir; to the east side of First Avenue.

Q. When you fix that value to-day you know there were actual sales of similar lots a few months before that—you knew of a sale, of the specific sale——

(Question withdrawn.)

Q. You know of the specific sale at the corner of First Avenue and Fifty-eighth Street, 195 feet by 100 feet, of 9¾ lots, at the rate of $3,200 a lot, don't you?

A. There were sales at various prices.

Q. Do you know of that sale?

A. I think I had a memorandum of such a sale.

Q. You testified in regard to it, didn't you, that you knew of it?

A. I had a memorandum of a good many sales.

3880 Q. You also knew of a sale in February, 1918, at the northeast corner of First Avenue and Fifty-ninth Street, 175 feet 2 inches by 100 feet, purchased by the Morse Company at the price of $35,000, which was about $4,000 a lot, didn't you?

A. I believe that is right.

Q. And your deduction from those two sales, were those two sales too high?

A. It was.

And, therefore, disregarding those sales, you valued the lot at $2,400?

A. I took those sales and other sales into consideration. There were many sales in that location.

Q. I am not asking you that. I am asking you about these two specific sales. Did you disregard those two?

A. I did not.

Q. But you took them into consideration and believed they were too high?

A. I did.

Q. The Morse Company had to have the property.

Q. There was also a sale there of nearly $5,000 a lot on March 1st, 1916, wasn't there?

A. There was some isolated sales in there; yes; some high and some low.

Q. Now, Mr. Hovenden, coming back to this question of the appreciation in value of this property between 1908 and 1918. In your opinion, this property in 1912, when you testified before the commissioners of appraisal, was worth 72 cents—71 or 72 cents a square foot?

A. Worth $1,300 a linear foot front, which equals practically 71 or 72 cents.

Q. Did you disregard the award of the commissioners of appraisal of a sale for purposes of consideration here?

A. I took it into consideration for what it might be worth. I didn't take one sale or any two or three sales as controlling. They are all factors of consideration.

381 Q. Did you take into consideration the appraisals by the Board of Appraisers, consisting of Mr. Troy and Franklin Taylor and Peter F. Lyman, in 1913?

A. I certainly did not.

Q. Do you remember my asking you before those commissioners of appraisal the value of that property as of 1904?

A. I believe you did.

Q. And you valued that property for me as of 1904 at 50 cents a square foot?

A. I think I valued it for you at $1,000 a linear foot.

Q. Let me refresh your recollection by the testimony. Were you asked this question and did you make this answer:

"Q. If it was worth 71 5/10 a square foot to-day or 70 cents a square foot and was worth only 7/10 of that in 1902 or 1903, it was only worth 49 to 50 cents a square foot in 1903—what was it worth on an average on a square foot basis in 1903?

"A. Worth about 25 per cent less.

"Q. That would be about 54 cents?

"A. Fifty-four cents.

"Q. And what had it appreciated by 1904?

"A. It had practically remained at a standstill in 1904.

"Q. So that it was still worth about somewhere between 50 and 55 cents a square foot in 1904?

"A. Yes, sir."

Did you make those answers to those questions?

A. Yes, sir.

Q. And did you know when you made those answers of the sale by the Langley estate to the Stuyvesant Real Estate Company in 1904 of two blocks of property standing within site of this property at the rate of 63 or 64 cents a square foot?

A. I believe I did.

382 Q. On September 29th, 1904, did you?

A. Yes, sir.

Q. And the property sold was the block between Sixty-third and Sixty-fourth Streets from the west side of First Avenue to the southerly line of Sixty-third Street running southerly 365 feet along the avenue, and containing 692,035 square feet?

The COURT. Between First Avenue and the bay?

Mr. RIGGS. From the westerly side of First Avenue to the pier-head line at a price of $438,000.

A. I think that is correct, yes, sir.

Q. And you knew of that sale at 63¼ cents a square foot at the same time that you appraised this property at 50 cents a square foot?

A. Excuse me, I did not appraise it at 50 cents a square foot.

Q. Between 50 and 55?

A. I made a deduction which worked out a value around that. That was only approximately.

Q. And the deduction you made from your own computation resulted in a value of between 50 and 55 cents and exactly similar property next door was sold for 63¼ cents?

A. That was a deduction made for you at the time sitting on the witness stand in answer to your question, and was not a direct valuation.

Q. Did you make this answer to this question at that time:

"Q. And did you not place the value of the Langley property on the north of Sixty-third Street on a par with the value to the south because you did not think that a sale established market

83 value, is that it?

"A. It was one of the things that went to establish a market value, but I did know at the time there was more upland in that property. I did not dissect it. I never tried to dissect that, or tried to convince myself that that was the exact value. I am asked now to give the exact value on this property as of several years ago, at a time when I didn't value it, and I am estimating its value approximately as of that date. Now, you take me up on your cross-examination and ask me how I reconcile a value of 55 cents, which is an offhand opinion of the value of 1904, to an actual sale adjoining it, and want me to reconcile my opinion as against that actual sale."

Did you make those answers to those questions?

A. I believe that is correct; yes, sir.

Q. Do you know of the sale of the Kent Estate to the Realty Company of America at the same time, about 1904?

A. 1904?

Q. Yes.

A. Wasn't that 1907?

Q. Nineteen hundred and four, exchange of property at the corner of One hundred and second Street and Broadway?

A. Exchange of property?

Q. Yes.

A. I don't recall that now. It was an exchange of property, but not a sale.

Q. Don't you recall Mr. Graham testified in your hearing he was the broker who brought about that transaction, and it resulted upon the exchange in a price he said of about 75 cents a square foot?

A. I don't remember that.

84 Q. Anyway, you didn't take that into consideration?

A. I may have taken it in for what it might have been worth.

Q. Did or didn't you? Did you consider that exchange between the property of the Kent Estate 185 feet wide and a plot upon the corner of One hundred and second Street and Broadway?

A. I could not say that, because I could not make the proper calculations, because I make no pretense of being familiar with values up at One hundred and second Street and Broadway, New York.

Q. Don't you remember Mr. Graham giving you that information and testifying to the fact that he was the broker in your hearing, Mr. Hovenden?

A. I may have, but I don't remember that.

Q. I suppose when you valued this property in 1918 you started with the fact that you had appraised it at $1,300 a linear foot in 1913?

A. I didn't start with that; I knew of it. I was quite familiar with the property and had made a study of it more than once.

Q. You started with that premise, it was worth $1,300 a front foot in 1912?

A. I certainly had it in mind.

Q. Why did you fix $1,300 in 1912 instead of $1,400?

A. Because I believed that was its value in 1912.

Q. How did you arrive at it?

A. My familiarity with the subject of which I claim to be familiar, sales that are made and had been made, and that had been made, and sales I had negotiated.

Q. What I mean is this: Did you make any mathematical computation at all?

A. I certainly made a good many figures before I arrived as to what was the value of the property in 1912.

385 Q. When you established $1,300 in 1912 you did not consider this sale of the Langley Estate to the Stuyvesant Realty Company?

A. Yes; I did.

Q. Did you consider the sale of the Kent Estate to the Realty Company of America?

A. I did not consider it a sale; was not familiar with it, as it was an exchange of property. I have told you already I am not familiar with the value of property in One hundred and second Street and Broadway, New York, and therefore I am not competent to make conclusions as to the actual values.

Q. In your opinion there was not one of those sales, including the Lotus Realty Company to the city of New York——

A. I did not consider the Lotus Realty Company as having any bearing on market value whatever.

Q. You did not consider the other sales?

A. I did consider those and some others.

Q. Did you make this answer to this question in arriving—in regard to your arrival as to the value of $1,300 a front foot:

"Q. Allow me to call your attention, Mr. Hovenden, to the fact that we have now talked about three different sales, and not one of them in your opinion has been the true criterion of market value?

"A. They are all elements.

"Q. They are all elements you considered?

"A. Yes.

"Q. But not one of them established in your opinion what was the correct market value of the property at the time it was sold?

"A. No one of them; no, sir."

Did you make those answers to those questions?

A. Right; I did.

386 Q. And did you make this additional answer to this question:

"Q. Now, I have asked you in regard to certain sales which you say you have taken into consideration, three sales I have enumerated?

"A. Yes, sir.

"Q. In your opinion do those sales bear out the valuation which you have placed upon this property?

"A. Not exactly; no, sir."

Did you make that answer to that question?

A. I believe I did.

Q. Will you assume for the purposes of my question that the property of the Bergen Estate extended—was unimproved as of April, 1918, and extended from First Avenue to the pierhead line of 1857? Will you put a valuation per linear foot upon that?

A. That is, assuming all conditions the same; that is, as to the virginity of the land, it being virgin land, not improved?

Q. Assuming the conditions to be the same, and assume, further, of course, it was filled in on either side of it as appears——

A. I would have valued the Bergen property at less money than $1,900 per linear foot front.

Q. How much less?

A. Probably 20 per cent.

Q. Now, Mr. Hovenden, you would not, as a matter of fact, have valued the Bergen property at any more than $1,000 a front foot?

A. I certainly would have valued it at more than a thousand dollars a foot front.

Q. And your best estimate is, you would have valued it about 20 per cent less?

A. Approximately 20 per cent less.

387 By the COURT:

Q. Do you consider the Bergan property increased in value between 1915 and April, 1918?

A. Did it increase? Yes, sir.

Q. What per cent?

A. Probably 20 per cent.

Q. Do you consider it as desirable property as the Langley property?

A. For the abutting owner; yes. But the Bergen property was hedged in by the developments of either side of it. It was virgin land a block 260 feet wide, running to the pierhead line; on the southerly side it had the Kings County Gas Company; on the north had the Bliss Company, also filled out to the bulkhead line. The logical buyer and the user of that property was either one of those two. The Bliss Company purchased this property in 1915 and have been developing and are now using it. The growth of their business at that

time warranted the purchase of that property by them and they acquired it.

Q. Would you say the Bergen property was capable of development as a pier proposition?

A. For a small pier.

Q. Was the Bergen as valuable as the Langley property——

A. I would think not, due to the fact it is hedged in by the fill to the bulkhead line on the north and south sides, which would interfere with egress and ingress of even a small ship to that property.

Q. Would that pier development add anything to the Langley property as compared with the Bergen property?

A. The Langley property, situated as it was, was the more valuable property for use. It could be utilized and made of more value than the Bergen property would have been.

388 Q. How much percentage should you say that the Langley property was more valuable than the Bergen property?

A. I think about 20 per cent.

By Mr. RIGGS:

Q. And the Bergen property had appreciated 20 per cent between 1915 and 1918, you said?

A. Yes; I think so.

Q. In your opinion there would be——

A. That is exclusive of the fact the Bliss Company had bought it and added it to their abutting land.

Q. Disregarding the fact it had been filled in?

A. Yes, sir.

By the COURT:

Q. Do you consider in 1915 the price of $1.10 for the Bergen property was reasonable, or high or low?

A. $1.10?

Q. Yes; a square foot?

A. It was high. It was not sold for $1.10.

Mr. RIGGS. I object——

The COURT. I understood there was testimony——

Mr. RIGGS. Mr. Graham testified that that was the price.

The WITNESS. That is assuming its area to the bulkhead line and not to the pierhead line.

Q. Will you look at this atlas, Mr. Hovenden; tell me whether that correctly represents the condition of the Bergen property as it existed at the time of the sale in 1915?

A. (After examining map.) Practically; yes, sir.

The COURT. Showing the witness what?

Mr. RIGGS. Showing the witness a page taken from an insurance map.

The COURT. Not in evidence?

389 Mr. RIGGS. Yes. I offer the map in evidence.

(The map was received in evidence and marked "Plaintiff's Exhibit U" of this date.)

Mr. BUCHNER. If it is introduced solely to show this Bergen property and the witness says it is the same, I have no objection.

The COURT. I am going to receive it for that purpose.

Mr. RIGGS. That is all it is offered for.

The COURT. Received only for the purpose stated.

By Mr. RIGGS:

Q. Did you know the Bergen—at the time the Bergen property was sold the existing high-water mark was about somewhere between 300 and 350 feet from the westerly side of First Avenue?

A. About 350 feet, I think.

Q. And from there extending out to the pierhead line of 1857, the present bulkhead line, the property of the E. W. Bliss Company had been filled in?

A. Yes, sir.

Q. Along the property line?

A. Yes, sir.

Q. And the property on the south of the Kings County Gas Illuminating Company had been filled in to the bulkhead line?

A. Yes, sir.

Q. Making a waterway from the high-water mark to the pierhead line of approximately 800 feet?

A. No——

Q. I mean from the high-water mark to the pierhead line of 1857, the present bulkhead line, about 800 feet.

A. About that.

Q. And if you wanted to erect a pier 1,400 feet long on it, then from the pierhead line of 1890—that is, the furthest one out—you would have to have about 800 feet of that pier, which would
390 cut in between those two filled improvements of the E. W. Bliss Company and the Kings County Gas Company?

A. It would.

Q. And I think you said in your opinion that pier should be how wide?

A. Sixty or seventy feet.

Q. Sixty or seventy feet?

A. Yes, sir.

Q. Well, now, Mr. Hovenden, didn't you testify before the Commissioners of Appraisal of the City of New York that the pier should be 125 feet wide?

A. The logical pier should be 125 to 150.

Q. But you could use sixty or seventy-five feet in width?

A. Yes, sir.

Q. Take sixty. That would leave only a slip 100 feet wide?

A. Yes, sir.

Q. Would that, in your opinion, be adequate for the berthing of vessels?

A. It would permit of the berthing of vessels; yes, sir.

Q. Don't you know the way business is done in the handling of cargoes here in the port of New York is that the lighter comes up alongside of the ship and that the ship discharges its cargo into the lighter alongside and on the dock simultaneously?

A. Very often.

Q. Isn't that the way, the usual way of doing business?

A. It is one of the ways.

Q. And that way would be impossible here?

A. You could not do it to the same advantage you could in an open highway. You would be restricted on the Bergen property.

Q. You could not do it at all?

A. Yes, you could.

Q. Do you mean to say you could have a ship lying alongside of a pier in a slip 100 feet wide—say a ship 300 or 400 feet long—and that there would be room for a lighter on the other side of it to discharge cargo, too?

A. Yes, sir.

391 Q. And get in and out past the traffic of that ship?

A. There would not be much traffic.

Q. You could not get one in and out past the other?

A. Not very well. Trouble would come.

Q. And a sixty-foot pier with a roadway say twenty feet wide for motor trucks in the center, would only give you thirty feet on either side?

A. It would give you less than that.

Q. It would only give you twenty feet on each side?

A. Yes, sir.

Q. Isn't it a fact, M. Hovenden, if you were going to build a pier on the Bergen property at all the best you could possibly do would be to have a pier abutting up against your neighbor to the north or south?

A. You could do that, or build a pier in the center.

Q. You still think you could build an adequate improvement of a pier——

A. I don't say adequate improvement. I say the Bergen property is impaired in its value by reason of its location.

By the COURT.

Q. That criticism does not apply to the Langley property?

A. It does not; no, sir.

By Mr. RIGGS.

Q. Was the reason you did not take the award of the commissioners, Mr. Trut, Mr. Taylor and Mr. Lyman, into effect due to the——

The COURT. Into consideration?

Q. (Continuing). Into consideration due to the fact that the sale was not carried out by the city?

A. Because it was not carried out by the city and because I knew the award was entirely too excessive.

392 Mr. RIGGS. I move to strike out the part of the answer wherein he says he knew the award was excessive.

The COURT. Strictly speaking, the question calls for yes or no. If you cannot answer yes or no, say so.

The WITNESS. I cannot answer yes or no.

Q. Then, Mr. Hovenden, I will ask you what was the reason?

A. The reason is because I testified in that proceeding, I believe, the award was excessive, and in conference with the corporation counsel they so concluded, and the proceeding was abandoned by them on behalf of the city.

Q. And the reason you believe the award was excessive was these three gentlemen, after a trial lasting over two years, gave an award of $1.44 a square foot for property you valued at 70 cents?

A. I did and I do.

Q. And you knew some of the property owners of that vicinity had put a value as high as $3 a square foot on that property?

A. Yes, sir.

Q. And the Kenyon people right next door to us so claimed?

A. Yes, sir.

Mr. RIGGS. That is all.

Redirect examination by Mr. BUCHNER:

Q. Isn't it a fact, Mr. Hovenden, that paying for rights to land under water in adjoining water front—that the depth of the water at the particular point is a material factor in figuring the value of that land?

A. It is.

Q. What relation does that value bear to the depth of water there?

A. What relation?

Q. Yes, I mean how is it affected by it?

393 A. Higher value to the greater depth, because it saves the dredging and excavating in order to get the depth of water to make it of proper use. A saving inuring to the benefit of the property and increases its value.

Q. It is one of the points of difference in the W. R. Grace Company property at the foot of Conover Street and the property of the Langley estate?

A. It is.

Q. And the answers you made to questions on your cross-examination as to this value, this particular land and other lands, assuming that something is the best use to which the land is put: As a matter of fact, Mr. Hovenden, don't you feel that the best use of property which is in its virgin state, is purely speculative?

A. To an extent that is true. In waterfront property that is not quite as applicable, for the reason waterfront property is restricted and there are two or three uses to which waterfront property can be put that makes it of real value.

Q. But the question as to which is the best use is a pure matter of judgment?

A. Matter of judgment and opinion of the individual user.

Q. There was something said about Greenville not having the depth of water or channel that the Bush terminals have. Was that channel completed at the time the Bush terminal project was started?

A. There was a channel through the lower harbor, but the big channel had not been completed until of recent years.

Q. By the big channel, you mean this 1,200-foot channel with the 40-foot depth?

A. I do.

Q. Is that reflected in value in the surrounding abutting water-front property?

A. That inures to the benefit of the surrounding abutting water-front property.

394 By the COURT:

Q. Including the Langley?

A. Including the Langley.

By Mr. BUCHNER:

Q. Including the Bush?

A. Including the Bush.

By the COURT:

Q. How much do you say that the new channel increased the value of the Langley property?

A. That would be hard to say. You could hardly specify it in a percentage of value. It is one of the elements. It permits of the passage of larger vessels.

Q. You could not put any percentage of increase?

A. No; one could hardly do that. It is one of the elements.

Q. Could you say it would make the property as much again as valuable?

A. No; it would be a smaller percentage than that.

By Mr. BUCHNER:

Q. The amount of dredging that would have to be done from a certain piece of property to the channel would also be a factor you would have to consider?

A. Naturally.

Q. In your cross-examination, Mr. Riggs picked out three or four sales, and asked you if you had considered those sales in arriving at the value of this property? In considering sales in relation to fixing the value of the property, do you simply take the price paid without paying any attention to the circumstances under which the sale was made?

A. No, sir; we want the circumstances under which prices are made, and then we want all the sales.

395 Q. Do you, in your opinion or in your judgment as an expert, feel that the circumstances, the relative position of the vendor and the vendee, the necessity for the acquisition by the particular vendee of that particular property, and the time at which it was acquired, and any other circumstance that you may know of that

govern the relations between those parties as to each other and as to the property under sale: Do you feel that those are competent circumstances to take into consideration in judging whether the value represents market value to an ordinary purchaser, or just simply the value of its acquisition by the particular vendee?

A. That is where the particular sales are made and wherein it is not fair, right or reasonable to take any one, two or three sales as controlling; they are all elements. The potentialities of the different properties must be considered.

Q. And you have considered all these sales throughout that district and for how long a period of time, Mr. Hovenden?

A. Twenty-five years.

Q. Have you considered all these sales of waterfront down there in making up your estimate as to the reasonable and fair market value of this Langley property on this date?

A. I believe I have considered practically every sale of which I had direct knowledge, yes.

Q. We have heard considerable here about a miniature Bush terminal; it would be a very miniature Bush terminal that could be on that 260-foot strip, wouldn't it?

A. It certainly would. That term is hardly applied to the 260-foot strip except as it would be used in connection with the 668-foot strip. That is my idea in talking about it that way.

396 Q. And as to that there is a 260-foot strip, or something of that sort, of the city's land between them?

A. There is some 400 feet of the city's between them.

Q. So that they would be really separate developments, wouldn't they?

A. They would be developed at one time, but they could be built at the one time and used, though bisected by the city land intervening.

By the COURT:

Q. Used as one proposition?

A. Used as one proposition, your honor, by segregating the larger interest of the large property, and the smaller interest of the small property, but all under one head and jurisdiction and control.

By Mr. BUCHNER:

Q. You mean that you would have operated by one executive staff?

A. I do.

Q. It would have been absolutely impossible for them to have a physical connection between them?

A. Except First Avenue.

Q. As a matter of fact that 260-foot strip, if carried out with a pier, would more resemble the Kenyon development or the Kerr Steamship Company, in your opinion?

A. It would be less than the Kenyon, because it is not of the same width. It would be something like the Bergen property if that were segregated and entirely to itself. It is the same width as the Bergen, 260; and Kenyon is over 300 feet.

Q. Just one other thing I want to clear up in my own mind: I understood you to say in answer to a question that was asked you on your cross-examination, that you thought the present congested condition of shipping in the harbor of New York was due to the
397 inability of private owners to complete proposed and pending improvements, is that so?

A. It is partially true.

Q. And when you talk about proposed and pending improvements, what relation in date does that bear to 1918?

A. Takes in 1918, 1917, 1919, and to-day.

Q. And how much influence has this inability to complete the proposed improvements by private owners had upon forcing the present congestion in the harbor?

A. It has had a good deal to do with causing the present congestion.

Q. Can you figure about the percentage of cause?

A. No.

Q. And what has been the cause of the private owner's inability to complete his improvement, in your opinion?

Mr. RIGGS: Objected to, no specific proof of inability to complete private improvements, and on the ground the witness is not competent to answer.

The COURT: I think we will have to confine it to the Brooklyn water front property.

Mr. BUCHNER: I am only asking him what his answer to that question on cross-examination meant. I want to know what, in his opinion, is the reason for the inability to finish improvements.

The COURT: Objection overruled.

Mr. RIGGS: Exception.

A. Scarcity of labor and material and high cost of both.

Q. Would those same factors have entered into a proposed improvement, or an improvement that had been started in 1918 on this Langley property by any private party?

A. Decidely so, yes.

398 By the COURT:

Q. Did, during the year 1918, the high cost of acquiring anything act as a deterrent?

A. There is no chance of getting either labor or material——

Q. You don't mean the high cost; you mean the impossibility of procuring it——

A. Both.

Q. Do you know of anything where high cost during the war prevented anything not being completed?

A. Completed?

Q. Yes.

A. Yes, sir.

Q. In connection with water front?

A. Yes, sir. That is applicable to everything. I have not any water front proposed improvement distinctly in mind, no.

Q. It is common knowledge that during the time we were prosecuting the war, the price of everything connected with shipping was on a scale that had never been known to this country?

A. Yes, sir.

Q. My question was whether you had ever heard of the price preventing anything being completed in connection with shipping or the docking of boats in New York Harbor?

A. No, sir.

Mr. RIGGS: I have no obection to the witness testifying to those things, but I ask it be received as his personal opinion, and no proof of any facts at all.

The COURT: Yes.

Mr. BUCHNER: That is his opinion. I asked him that.

399 Recross-examination by Mr. RIGGS:

Q. I thought you said this Langley property, or the Bay Ridge property was ripe for immediate development in 1918?

A. It was and is now.

Q. You don't mean it is now. It has been developed?

A. Surely.

Q. You also said there was not any place exactly like it in the harbor ripe for immediate development?

A. There were not any other places to go. I said there was nothing I liked as well as the Langley property.

Q. What are these projected improvements you spoke of? Name me one in any way similar to the development of the Langley property which was commenced about 1918 that is not finished yet?

A. I know of none that was commenced in 1918. I have no specific one in mind.

Q. Name one that was proposed in 1918 that was finished?

A. I don't know of any.

Q. Don't you know since 1918, as a matter of fact, the Henry Steers Company have completed four piers at Greenpoint?

A. Since 1918?

Q. Yes.

A. I do not. They have rebuilt——

Q. Don't you know as a matter of fact——

The COURT: Wait a minute. Did I understand you to say they had rebuilt them?

The WITNESS: I understand there has been some rebuilding there.

By Mr. RIGGS:

Q. The ones I refer to are absolutely new piers?

A. I don't know of any being completed as you mention.

Q. You don't know the locality I speak of?

A. I know the locality.

400 Q. So that, as a matter of fact, you cannot name a single projected improvement under way at the present time to increase the supply of piers at which ships may be tied up?

A. I don't know of one.

HENRY LINCOLN GREEN, called as a witness on behalf of the defendant, and being duly sworn, testified as follows:

Direct examination by Mr. BUCHNER:

Q. Where are you attached?

A. Army supply base.

Q. What is your occupation, Major?

A. I am an officer of the Construction Division, sir, United States Army.

Q. And attached to the Army terminal in South Brooklyn?

A. Yes, sir.

Q. Have you been attached there since 1918 when this work was started?

A. Yes, sir.

Q. Have you had charge of the construction there?

A. Yes, sir. Under my superior officer.

Mr. RIGGS: I object to that unless the particular work is specified.

The COURT: Objection overruled.

Q. Have you particularly had charge of the dredging and the building of the piers?

A. No, sir.

Q. Down there?

A. No, sir.

Q. Have you supervised that construction?

A. No, sir.

Q. What particular branch of it have you supervised?

A. The buildings erected on the land, sir.

401 Q. Did you have charge of the construction of piers—any part of these piers down there?

A. No, sir; only the bulkhead which surrounds the power plant. That is the nearest to the pier construction which I personally had charge of.

Q. Did you have any connection with the fixing of the prices and the paying of the prices for the construction of these piers?

A. None whatever.

Q. All you fixed was the bulkhead?

A. All I fixed was the bulkhead.

Q. Do you know what the cost of the construction of the piers down there on this South Brooklyn property army terminal was?

Mr. RIGGS. I object to that.

The COURT. He may answer yes or no.

A. Yes, sir; I have all the construction division records in that matter.

Q. Do you know what the cost of the dredging of all this land down there was?

Mr. RIGGS. Same objection.

The COURT. Objection overruled.

Mr. RIGGS. Exception.

A. I have those records, also, sir.

Q. These records that you refer to, and which show the cost, are those the official records of the construction down there?

A. This is a recapitulation of the construction records made by the constructing quartermaster.

Q. And that is an official record in your office?

A. Yes, sir.

Q. Can you tell us from your knowledge of these official records what the—will you tell us from your knowledge of these official records what the cost of dredging on the South Brooklyn army terminal was?

402 Mr. RIGGS. I object to the question upon the ground that the witness is not qualified to state of his own knowledge, and what he states may be necessarily hearsay; and upon the further ground that the testimony in any event would be incompetent, irrelevant, and immaterial upon the issue of value between the plaintiff and the defendant.

The COURT. For the sake of argument, disposing of that objection to the question, can you prove a fact by this witness simply testifying that Government figures are official figures?

Mr. BUCHNER. He is testifying as to what it cost. Now, as to whether or not that is the fair and reasonable value, is a question——

The COURT. He is testifying to——

Mr. RIGGS. What somebody reported to him it cost.

The COURT. Don't you think some one else ought to prove the correctness of the record?

Mr. BUCHNER. No, I think these official records are a measure of the cost of the improvements.

The COURT. That is not the point; it is whether the testimony is competent. If the record bears out your statement—as I have no doubt it does, or you would not make the statement—I am going to allow the testimony, but I will not allow it unless it is proved in a proper way.

Mr. BUCHNER. My theory is, if we were, for instance, trying
403 out the question of what any ordinary merchandise had cost somebody, if I came in and said I saw the bill for the payment and it was receipted for that amount that was shown, that would be some proof of what it cost. That is exactly what he is testifying, what the records show the contractors and people down there got for these things.

Mr. RIGGS. May it please the court, aside from the competency of the testimony, I raise the point it is immaterial to the issues. It has always been considered improper in condemnation cases to permit a witness to take the stand and say that this is a vacant piece of property and I value it upon the basis that if it was improved so much it would bring in so much rent return—in other words, conduct a speculation. In other words, it has been proper to permit the witness to base his value upon sales of similar values and make any competent deductions he may please to check his other values. The Government of the United States has requisitioned this property and

erected upon it an improvement similar in some ways, but there is no proof in the case, and obviously, it would be incompetent to permit the claimant to prove what use the Government had made of it. The measure of damages is not what the value to the Government is, but the loss to the owner, and therefore it would be improper for me as part of my case to——

The COURT. What do you think of that?

Mr. BUCHNER. Didn't he ask——

Mr. RIGGS. Let me finish.

404 The COURT. It is not his fault. I asked him a question. I will hear you through first.

Mr. RIGGS. In addition to that, we are totally ignorant of what the improvement was that had been put by the Government. We know the Government has made some improvements, but what it is we have no plans—whether that improvement coincides or is the same one that Mr. Farley said was the possible use—Mr. Farley did not say this was the only way that property could be improved; he just said he thought it could be improved in this particular way. Now, for this gentleman to be permitted to testify what an improvement of a totally different character put upon the property by the condemning power is and what that cost the condemning power, is absolutely incompetent and immaterial evidence.

Mr. BUCHNER. I will withdraw that question and ask him a couple of other questions which I think will bring it down.

The COURT. Before you go on with that, if you are going to bring this out in another way, let me suggest something to you: Suppose that the Government had thought this piece of property was adapted for a display sign better than any other property in New York City and had erected a beautiful place for the purpose of showing pictures for the stimulating of the patriotism of the people of this country. Certainly the cost of that would have nothing to do with this. The Government thought it should put up a big storehouse there to assemble supplies of various sorts——

405 Mr. BUCHNER. I was not going to pay attention to those things, because they were never given to us, but Mr. Farley said he could build 100-foot wide piers 1,400 feet out into that stream for a million and a fraction dollars, and I am going to prove, as a matter of fact, he could not build one of them for that.

The COURT. Go ahead. I will permit that proof.

Mr. RIGGS. Exception.

By Mr. BUCHNER:

Q. Tell me, Major, how much did it cost the Government for the bulkhead work that had to be done down there?

Mr. RIGGS. I object to that.

Mr. BUCHNER. That is the thing he said he had absolute charge of.

The COURT. You said that, Major?

The WITNESS. No; I said I had charge of the portion of the bulkhead which surrounded the power plant.

By the COURT:

Q. Have the records of the Government come into your possession and under your control?

A. Yes, sir.

Q. Are you able to state from your service with the Government that these records correctly give what the Government dispensed in that matter?

A. Yes, sir.

The COURT. I think I will take it.

Mr. RIGGS. I urge my original two objections—the witness not competent and it being hearsay; and object on the further
406 ground it is immaterial and irrelevant upon the issues; third, the witness is obviously speaking of a different bulkhead constructed by the United States, which, for all we know, was entirely different in character, material, and design to the bulkhead assumed by Mr. Trout or Mr. Farley.

The COURT. Objection overruled.

Mr. RIGGS. Exception.

By Mr. BUCHNER:

Q. Will you give us the cost of that bulkhead, Major, if you please?

A. I have that in the envelope which I brought with me. I haven't that in mind.

(Envelope handed to the witness.)

Q. The cost of bulkhead, if you please?

A. The entire bulkhead, sir, stretching from one end of the property to the other, is listed under the official figures at $223,092.04. That is the bulkhead alone for the entire property.

Q. That carried the same unit of value over the whole area, did it?

A. Yes, sir.

The COURT. Unit of cost.

Q. I mean, it had the same unit of cost over the whole area?

A. Yes, sir.

Q. Will you tell me, Major, how long that bulkhead was?

Mr. RIGGS. That is all subject to the same objection and exception?

The COURT. Objection overruled.

Mr. RIGGS. Exception.

A. Yes, sir, there is approximately 1,490 feet of bulkheading.

407 Q. Where does that run from, Major? Can you tell us on that map there, plaintiff's Exhibit 1?

The COURT. The shore on that map is to your left?

The WITNESS. Yes, sir.

The COURT. The two properties are the green property at the top, and then the white strip is between and the other property is the remaining part of the Langley tract?

(Witness indicates on map.)

Mr. RIGGS. Indicating a point on pierhead line between the Kenyon property and the Langley property.

The COURT. And the northern Langley tract.

The WITNESS. Yes, sir; to Sixty-third Street, sir.

By Mr. BUCHNER:

Q. From this boundary here to here [indicating]?

A. Yes, sir.

Q. This is the extended portion of it under water, Major? The high-water mark is in here [indicating]?

A. That bulkhead, sir, comes out from the Kenyon property so, and then bulkheads the entire property down to Sixty-third Street.

Mr. RIGGS. I would like to have it appear on the record the witness is also indicating the property of the city of New York as well as the Langley property.

Q. How wide was that bulkhead; was it the same width all the way up?

A. Same thing, sir, same construction.

408 Q. So that if you took the area that is included in that property that is left in white on plaintiff's Exhibit 1—which was what was formerly the city's property—you would have the cost to the Government of bulkheading the two properties in pink and green on plaintiff's Exhibit 1, is that so?

A. Yes, sir.

Q. Can you make that calculation for us, Major, if you will?

A. How wide is that property, please?

Q. The city's property is 422 feet 2 inches. The upper Langley property is 668 feet. And the lower is 260 feet 4 inches?

A. Will you give me those again, please?

Q. Two hundred sixty feet four inches; 668 feet 1 inch is the other Langley property. Now, besides that there is what was formerly the city piece of 422 feet 2 inches?

A. Do you want the cost of bulkheading the city property?

Q. The Langley property.

A. The entire Langley property?

Q. Yes.

A. Approximately for the Langley property, that sum, approximately, $149,000.

By the COURT:

Q. Of the $223,000?

A. Yes, sir.

By Mr. BUCHNER:

Q. One hundred and forty-nine thousand dollars?

A. Yes, sir.

Q. Will you tell us, Major, what the cost to the Government was of dredging the way between piers there—how far out did the dredging run, to the channel?

Mr. RIGGS. Objected to.

The COURT. Objection overruled.

Mr. RIGGS. Exception.

409 Q. Will you tell us the cost of that dredging?

Mr. BUCHNER. Objected to.

The COURT. Objection overruled.

Mr. RIGGS. Exception.

A. Entire dredging was $1,056,074.

Q. How much a cubic yard did that cost?

Mr. RIGGS. I won't repeat these objections.

The COURT. I think you have got in the record now enough on this proposition of law.

A. $.611, sir.

Q. How much a linear foot——

The COURT. That is 61.1 cents a cubic yard?

The WITNESS. Yes, sir.

By Mr. BUCHNER.

Q. How much a linear foot did the bulkhead cost?

A. Working back from my records, it shows the bulkheading cost per linear foot approximately $149.75 a foot.

By the COURT:

Q. $149.75?

A. Yes, sir.

By Mr. BUCHNER:

Q. The Government placed how many piers down there?

A. Four piers, sir.

Q. Three of them were the same width?

A. Yes, sir.

Q. One hundred and fifty feet?

A. Yes, sir.

Q. And the other one was a small pier?

A. The other one was an uncovered pier.

410 Q. How wide?

A. Approximately 60 feet.

Q. And the other piers were shedded piers?

A. Two shedded piers; yes, sir.

Q. How long were the piers?

A. They vary in length, sir.

Q. Pier No. 1 is the small one?

A. Pier No. 1 is the narrowest, but longest.

Q. Is that at the northerly or the southerly end of the property?

A. Southerly.

Q. Next to Pier 1 is Pier 2. Will you give us the length of that?

A. That is in the album, sir, which I have here, album of plans. I can give it to you immediately.

The COURT. What is the object of going into all these details?

Mr. BUCHNER. I am just going to get the measure of value of the pier now.

The COURT. Why not ask him that?

Mr. BUCHNER. I want to show the length of it.

The COURT. What difference does that make?

Mr. BUCHNER. What the Government got done there.

The COURT. Why not ask him?

Mr. BUCHNER. That is what I asked him, the length of the pier, and he said he wanted to look it up to get the exact dimensions; that is all.

The COURT. All right.

A. Pier 2 is 1,324 feet 1½ inches.

Q. Will you tell us what the cost to the Government of the construction of Pier No. 1 was?

Mr. RIGGS. I will repeat the objection. It is obvious from the witness's testimony that the pier erected by the Government is
411 entirely different and dissimilar from any pier which could have been in the contemplation of plaintiff's witnesses; that the witness can only testify from hearsay, and the testimony is incompetent, immaterial and irrevelant upon any question of value.

The COURT. I think myself that the testimony is very doubtful, but I have concluded to receive it, so I shall overrule the objection.

Mr. RIGGS. Exception.

Q. I wish to know the cost of Pier 2?

A. The total cost of Pier 2 is $2,210,193.51.

Q. Have you the cost per square foot of that pier?

A. I have not.

Q. Have you the cost per square foot of all the piers?

A. I have not. It would have to be figured from areas.

Q. Was the square foot cost the same over all of it?

A. It would not be the same for all of them, sir.

Q. How does it vary?

A. I have no square-foot figures. I have total costs of all three piers, the three piers that are alike vary in cost; so therefore, as they were approximately the same size, their square foot cost would be different.

Q. They were not the same size?

A. Very nearly, sir; same width and a few feet longer.

Q. Wasn't the——

A. The pier shed was exactly the same in all cases.

Q. Do you know the square foot value of the cost of the shed?

A. No, sir. We don't keep any of our records in square foot values.

Q. This pier 150 feet wide and 1,326 feet in length cost $2,210,193.51, is that so?

Yes, sir.

412 Q. Have you had any experience in pier building besides this?

A. Yes, sir.

Q. And the cost of construction?

A. Sir, I present to you that I have in the past not done a great deal with the cost of construction, having to do the physical work of building them. I am an engineer rather than an accountant.

Q. You know the engineering cost of an improvement, don't you, Major?

A. I can not make any general statement. They are all predicated upon the particular conditions surrounding that work.

Q. Let me show you plaintiff's Exhibit T and ask you to look at it. Will you tell me if you see these three piers, each 1,400 feet long and 100 feet wide?

A. Yes, sir.

Q. Can you tell from your experience what, in 1918, the approximate cost of a 1,400-foot pier 100 feet wide down there, shedded pier, would have been?

Mr. RIGGS. Objected to on the ground the witness says he is not qualified to state.

The COURT. Objection overruled.

Mr. RIGGS. Exception.

Q. Can you tell us?

A. What is the construction of the pier?

Q. Those are little details that the man who drew the plan did not give us.

Mr. RIGGS. You didn't ask him. That is the reason.

Q. It is a one-story shedded pier?

A. Yes, sir.

Q. How much do you think the cost in 1918, in April, would have been of a pier 1,400 feet long and 100 feet wide, located down in that property, down in South Brooklyn?

413 *Henry Lincoln Green—For defendant—Cross.*

Mr. RIGGS. I object unless the further construction of the pier is indicated, the nature of the piling, whether or not a cement platform, the nature of the doors upon the shed, and so forth.

The COURT. Objection overruled.

A. That is exactly what I must ask you, sir.

Q. Do you, Major, from your experience, think you could have placed three 1,400-foot piers 100 feet wide at that property, with a dredged out fairway of 40 feet between them, and then a dredged out channel to the regular channel, at a cost of $2,384,501, to include the cost of all the work including the sheds, piers, bulkhead line, and dredging?

A. No, sir.

Q. Does that represent anywhere near the price at that time.

Mr. RIGGS. I object to that.

The COURT. Objection overruled.

Mr. RIGGS. Exception.

A. I do not feel, sir, that represents a fair cost.

MR. BUCHNER: That is all.

Cross-examination by Mr. RIGGS:

Q. Are you acquainted with the bulkhead to the north of the Langley property?

A. Only in so far as I excavated and exposed the end of it.

Q. That bulkhead is an entirely different bulkhead from the bulkhead erected by the Government at its army base?

A. Yes, sir.

Q. And basing the cost of the work of that Army supply base bulkhead at $150 a linear foot, roughly, would the Kenyon bulkhead, in your opinion, cost over a hundred?

A. No, sir.

414 Q. It is a bulkhead of a different character and inferior in lastingness and worth to the Government work?

A. Yes, sir.

Q. But it does serve its purpose as a bulkhead?

A. At the present time.

Q. I believe you stated the figures reported to you as to the cost of dredging were approximately 61 cents a cubic yard?

A. Yes, sir.

Q. You would not state, in your opinion, Major, that it would have been impossible in April, 1918, to have erected a bulkhead upon the Langley property similar to the bulkhead upon the Kenyon property, being a continuation of it, for instance, at a cost of not exceeding $100 a linear foot, would you?

A. Not greatly varying from that, sir; no.

Q. Do you konw Mr. Charles E. Trout, the engineer of the Henry Steers Company (Inc.)?

A. I do.

Q. And you know his concern, don't you?

A. I do.

Q. If he said that it could be done at a cost of about $100 a front foot, would you disagree with him?

A. I have disagreed with Mr. Trout many times, sir, but I feel in matters pertaining professionally, I should take his word.

By the COURT:

Q. Would you consider that matter just described as "matters professionally"?

A. Yes, sir.

By Mr. RIGGS:

Q. Major, the piers that the Government erected upon this property were about 1,300 feet long and consisted of two-story sheds, didn't they?

A. Yes, sir.

415 Q. And they are the only two-story shedded piers in the city of New York, aren't they?

A. No, sir; there are others.

Q. The Kenyon pier, for instance, next door, is one-story shedded pier, isn't it?

A. Yes, sir.

Q. What would you say as to the comparison of the nature of the construction between the Kenyon pier and the pier erected by the Government—say, for instance, two or three?

A. They can not be compared. They are totally different.

Q. Any comparison at all?

A. No comparison at all——

Q. In the solidity of construction or the work involved in construction?

A. No comparison at all.

Q. For instance, the Government piers were erected first of all, the dredging done and then the piles laid down and a cement platform?

A. No dredging underneath the piers.

Q. After the piles were put in the cement platform was laid?

A. Yes, sir.

Q. That is a different construction from the Kenyon pier?

A. Absolutely, sir.

Q. What would—would you say that the unit of cost of $2 a square foot for the Kenyon pier was a reasonable and fair cost of a pier 150 feet wide and approximately 1,400 feet long?

A. Knowing the Kenyon Pier, I would say it was almost excessive.

Q. Would you say, for instance, that the cost of the shed of $1.93 or $2 was or not the fair and reasonable cost of a shed similar to the shed on the Kenyon Pier?

A. Is this per square foot?

Q. Yes.

A. I would say it was excessive.

Q. Quite a liberal allowance?

A. Excessive.

Q. In replying to the question of Mr. Buchner you did not believe certain piers could be built for a certain amount of money;
416 what kind of piers were you taking into consideration?

A. That a pier of——

Q. I will withdraw that and ask you the question in this way: Don't you believe that the three piers could have been erected upon the property of the Langley Estate about April, 1918, according to the layout, plaintiff's Exhibit T, I think, which has been handed to you, similar in construction and length and details and workmanship to the Kenyon pier for the amount for which Mr. Buchner asked you?

A. I don't think so; not at that time.

Q. You just told me that the cost of $2 a square foot, upon which I think you just testified you heard Mr. Farley relied, was excessive?

Mr. BUCHNER. I don't want you to misquote me. It was not my question.

The COURT. The major did not hear that.

Q. You did say a unit cost of $2 a square foot for a pier similar to the Kenyon pier was excessive?

A. Yes, sir——

Q. At a cost a shed of $1.93 for a shed similar to the Kenyon pier was excessive?

A. Yes, sir.

Q. Would it be necessary for you to know before you answer the question intelligently of the size, cost, and construction of piers, to know of the construction contemplated?

A. Could not answer it otherwise.

Q. And in answering Mr. Buchner's question had you any details upon which to found your answer?

A. None whatsoever, except that the——

Q. Do you think anybody but an engineer can figure cost of the construction of a pier?

A. It depends upon how it is done. There is a great deal of approximation which is done by people who are not engineers.

417 Q. Have you ever seen the Bush Terminal piers?

A. Yes, sir.

Q. Some of them are two-shedded piers?

A. Yes, sir. But none of them of the type built by the Kenyon Company.

Q. The old ones, how did they compare with the Kenyon Company's plan?

A. The old ones are better piers than the Kenyon plans.

Redirect examination by Mr. BUCHNER:

Q. When you were fixing the measure of value for the Kenyon Pier in answer to Mr. Riggs's question, were you figuring that as of 1918, April, or as of the date on which you think they were constructed?

A. The date they were constructed.

Q. What we wanted was what you would have figured the costs would have been in April, 1918?

A. I think under the conditions existing in 1918 any man has no right to make approximation figures governing construction work of any kind. The conditions were so upset, both labor and material, that no man has any right to make any approximation figures for work done at that time.

Q. You should not like to be understood as fixing the values in the New York proposed improvement which should be given here as of April, 1918?

A. No, sir; I don't feel you can do any kind of construction work without careful examination of its details in the conditions existing in 1918.

Mr. BUCHNER. Outside of the introduction of a couple of sections of the charter the Government rests.

The COURT. Any more proof, Mr. Riggs?

418 Mr. RIGGS. I find I neglected, in the cross-examination of Mr. Hovender, to put in evidence this copy of the minutes of the meeting of the Land Board——

The COURT. You can offer it now.

Mr. RIGGS. I would like to offer it now as if Mr. Hovender was still on the stand.

Mr. BUCHNER. I will object to it on the ground no proper foundation has been laid for the reception of it.

The COURT. Objection sustained.

Mr. RIGGS. You don't object on the ground it is a copy.

Mr. BUCHNER. No.

The COURT. For what purpose do you offer this, Mr. Riggs?

Mr. RIGGS. Upon the question of the witness's statement that a grant to the pierhead line of 1857 would be just as valuable as it would be to the pierhead line of 1890; for the purpose of showing in some specific case as near as I could get to the property in question, property somewhat similar in nature was appraised and only granted upon the payment of the fully appraised value to the State by the riparian owner.

The COURT. Objection sustained.

Mr. RIGGS. Exception.

(Received in evidence and marked "Plaintiff's Exhibit V" for identification of this date.)

Mr. RIGGS. May we turn over to the dock department these official maps?

The COURT. Yes.

(Plaintiff's Exhibits G and H are withdrawn and handed to the representative of the dock department.)

419 The COURT. They were brought here by a representative of the dock department under a subpœna issued out of this court so that you can return them now to the proper record place.

Mr. BUCHNER. I am going to offer in evidence two sections of the charter of the city of New York, sections 844 and 859.

The COURT. I think I will take these sections over your objection and give you an exception and consider they are introduced in evidence and marked, and upon the final disposition of this case you will be in a position to argue regarding them.

Mr. RIGGS. I object to the introduction of the sections of the charter upon the ground they have no application whatsoever to the property of the Langley Estate, the nature of the estate held by them, inasmuch as section 83 of the charter grants whatever powers are granted to the commissioner of docks subject to the rights of existing riparian owners.

The COURT. Why not give the city title to this property? I think I shall do so unless some strong reason is advanced why I should not.

Mr. BUCHNER. I make the formal motion to dismiss.

The COURT. Motion denied, exception to the Government.

Mr. BUCHNER. I renew my motions made at the close of the plaintiff's case to strike out the testimony of the witness Farley.

The COURT. Motion denied, exception to the Government.

Mr. RIGGS. This is the stipulation: "It is stipulated by and
420 between the attorneys that upon the trial of the case the United States will admit the allegations set forth in paragraphs 3 and 4 of the amended complaint herein, excepting and reserving from such admission, however, title to the real property comprised in the beds of Sixty-first, Sixty-second and Sixty-third Streets, Brooklyn, city of New York, extending from the westerly side of First Avenue to the high-water mark, the title to which said property is claimed by the United States of America to be in the city of New York."

The COURT. You gave me at the outset of the trial what purports to be the copy of the pleadings. You have referred to an amended complaint here, and this document you have given me is not an amended complaint.

Mr. RIGGS. That is correct, your honor, because the only amendment was the introduction of the city of New York as a party.

(Testimony closed, briefs to be submitted.

421 *Motion of United States of America to be permitted to introduce additional testimony and denial thereof.*

United States District Court, Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA AND THE CITY OF NEW YORK, defendants.

The defendant, United States of America, moves that it be permitted to introduce in evidence additional testimony, to wit, the deed executed by William H. Langley and John F. Dunning, as trustees of the last will and testament of William C. Langley, deceased, to the Stuyvesant Real Estate Company, and recorded in the office of the register of Kings County on October 1st, 1904, in section 18,
422 Liber 15, page 229, also section 83 of the Charter of the City of New York.

Dated this 5th day of January, 1921.

LEROY W. ROSS,
*United States Attorney, Eastern District of New York,*
*Attorney for Defendant, United States of America.*

Motion denied. The defendant, the United States of America, may have an exception.

January 5th, 1921.

EDWIN L. GARVIN,
*U. S. D. J.*

423 *Order denying motion to amend answer of the City of New York and rejecting proof.*

United States District Court for the Southern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF THE trusts created by the last will and testament of William C. Langley, deceased, plaintiff,

*against*

UNITED STATES OF AMERICA AND THE CITY OF NEW YORK, defendants.

Hon. EDWIN L. GARVIN, *United States Judge.*

The defendant, The City of New York, offers in evidence the following:

Letters patent dated March 4th, 1889, issued by the People of the State of New York to William C. Langley, acknowledged
424 March 4th, 1889, and recorded in the Register's Office, Kings County, State of New York, in Liber 15, section 18 of conveyances, page 212, on September 27th, 1904.

Chapter 609 of the Laws of 1870 of the State of New York entitled "An act to amend the act entitled 'An act for the appointment of commissioners to lay out a plan for roads and streets in the towns of Kings County,' passed May seventh, 1869."

Chapter 331 of the Laws of 1872 of the State of New York entitled "An act supplemental to an act entitled 'An act for the appointment of commissioners to lay out a plan for roads and streets in the towns of Kings County,' passed May seventh, 1869."

Sections 83, 258, 970, 980, 981, 984, 985 and 1003 of chapter 378 of the Laws of 1897 of the State of New York and known as The Greater New York Charter which act is entitled "An act to unite into one municipality under corporate name of the city of New York, the various communities lying in and about New York Harbor, including the city and county of New York, the city of Brooklyn and the county of Kings, county of Richmond, and part of the county of Queens, and to provide for the government thereof."

The said defendant moves to amend its answer in the following respects:

By striking out the words "New York Bay" being the last three words contained in paragraph "I" of the said defendant's
425 answer and substituting in place thereof the words "pierhead line established by chapter 491 of the Laws of the State of New York of 1884 and approved by the Secretary of War on March 4th, 1890."

Respectfully submitted. JOHN P. O'BRIEN,

*Corporation Counsel, Attorney for Defendant The City of New York; Office and Post Office Address, Municipal Building, Borough of Manhattan, New York City.*

Dated, BROOKLYN, *January 5, 1921.*

17270—22——18

This offer was made by defendant The City of New York, and denied by the court and a motion made to amend the answer by said city, which was denied, before the findings were made and signed herein January 5, 1921.

Defendant had an exception.

EDWIN L. GARVIN,
*U. S. D. J.*

426 *Findings of fact and conclusions of law.*

United States District Court for the Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA AND THE CITY OF NEW YORK, defendants.
L-932.

The issues of fact in the above-entitled action having regularly come on for trial before the undersigned at a term of this court held in the Post Office Building, Borough of Brooklyn, city of New York, on the 11th, 12th, and 13th days of May, 1920, and the parties having stipulated in writing that a jury herein be waived, which stipulation is filed with the clerk of this court, and the plaintiff having appeared herein by Gannon, Seibert & Riggs, Esqs., his attorneys (William H. Seibert and Royal E. T. Riggs of counsel), and the United States of America by Leroy W. Ross, United States attorney (Charles J. Buchner of counsel), and the city of New York by John P. O'Brien,
427 corporation counsel (E. J. Kenny of counsel, and the allegations and proofs of the parties having been heard, I do hereby find as follows:

1. That the United States of America is a sovereign power created by the Constitution of the United States, with its principal offices in the city of Washington, District of Columbia.

2. That William C. Langley, late of the county of Kings, died on or about the 1st day of December, 1890, seized in fee simple absolute of two certain pieces or parcels of land hereinafter described, located in the Borough of Brooklyn, county of Kings, city and State of New York, and within the territorial jurisdiction of the United States Court for the Eastern District of New York; that said William C. Langley left a last will and testament, dated February 8th, 1890, which said last will and testament was duly admitted to probate by the Surrogate's Court of the County of Kings, State of New York, wherein and whereby said William C. Langley devised and bequeathed said premises hereinafter described, together with other property, to certain trustees therein named, to wit: William H. Langley and Charles C. Goodrich, in trust for the uses and purposes and with the powers therein set forth.

3. That said William H. Langley and Charles C. Goodrich accepted such trusts and duly qualified as such trustees under said last will and testament and respectively entered upon the duties thereof; that thereafter said Charles C. Goodrich resigned and William F. Dunning was duly appointed as substituted trustee in his place under said will, by order of the Surrogate's Court, County of Kings,
428 State of New York, and said William F. Dunning accepted said trusts and duly qualified as such trustee and entered upon the duties thereof; that thereafter said William F. Dunning died April 1st, 1907, and George F. Benedict was duly appointed as substituted trustee in his place under said will, by order of the Supreme Court, County of Kings, State of New York, dated September 6th, 1907, and said George F. Benedict accepted said trusts and duly qualified as such trustee and entered upon the duties thereof; that thereafter and on or about June 22nd, 1919, said William H. Langley died, and the said George F. Benedict is now and has been since said date the sole surviving trustee under the said last will and testament.

4. That for many years prior to April 6th, 1918, and on said date, said William H. Langley and George F. Benedict, as trustees as aforesaid, were the owners in fee and were duly seized and possessed of the following described property, situate, lying and being in the Borough of Brooklyn, city of New York, and State of New York, and situated within the jurisdiction of the United States District Court for the Eastern District of New York; so devised in trust by William C. Langley, as hereinbefore set forth:

"All those certain lots, pieces or parcels of land, situate, lying and being in the Borough of Brooklyn, county of Kings, State and city of New York, more particularly described as follows:

"Parcel No. 1.

"Beginning at the point of intersection of the westerly line of First Avenue and the centre line of Fifty-eighth Street; run-
429 ning thence westerly along the centre line of 58th Street and its prolongation eighteen hundred and twelve feet (1812) and seven inches (7) more or less to the pierhead line established by chapter 491 of the Laws of the State of New York of 1884 and approved by the Secretary of War on March 4th, 1890; thence southerly along said pierhead line two hundred and sixty feet (260) and four inches (4) to a point opposite the prolongation of the centre line of 59th Street; thence easterly along the centre line of Fifty-ninth Street and its prolongation eighteen hundred and nineteen feet and seven inches (7) more or less to the westerly line of First Avenue; and thence northerly along the westerly line of First Avenue two hundred and sixty feet (260) and four inches (4) more or less to the point or place of beginning, containing approximately Four hundred and seventy-two thousand, seven hundred and eighty and one-tenth (472,780.1) square feet.

"Parcel No. 2.

"All that certain lot, piece, or parcel of land beginning at the point of intersection of the westerly line of First Avenue and the southerly line of Sixty-third Street and its prolongation; running thence northerly along the westerly line of First Avenue six hundred and sixty-eight (668) feet and one (1) inch to a point one hundred and eighteen feet and one inch northerly from the center line of Sixty-first Street; running thence westerly at right angles to
430 the westerly line of First Avenue eighteen hundred and thirty-four (1834) feet and five and one-half inches (5½), more or less, to the pierhead line above described; thence southerly along said pierhead line approximately six hundred and sixty-eight (668) feet to a point on said pierhead line formed by the intersection therewith of the southerly line of 63rd Street prolonged; thence easterly along the southerly line of 63rd Street prolonged eighteen hundred and eighty-two (1882) feet three and three-eighths inches (3⅜), more or less, to the point of beginning, containing approximately one million two hundred and forty-one thousand five hundred forty-one and nine-tenths (1,241,541.9) square feet."

5. That on or about April 6th, 1918, all the real property hereinbefore described, except those portions thereof lying in the beds of proposed 63rd Street and 58th Street, between 1st Avenue and the pierhead line as laid out on the Land Map of the City of New York, such streets not yet being opened, and all right, title, and interest of the said trustees therein and thereto was requisitioned, commandeered, and taken by the United States of America, acting through the President as its duly authorized agent, for an Army supply base and expeditionary depot, to provide facilities for the storage of supplies connected with the common defense; that the United States of America, in making said requisition, known as Army requisition No. 8 B/C, acted under authority of section 10 of the food & fuel act of August 10th, 1917 (40 Statutes 279), authorizing the
431 President of the United States from time to time to requisition feeds, foods, fuels, and other supplies necessary to the support of the Army or any other public use connected with the common defense, and to requisition or otherwise provide storage facilities for such supplies, and to ascertain and pay a just compensation therefor; and on said 6th day of April, 1918, the United States of America took possession of said premises hereinbefore described, excepting such portions thereof as lay in the beds of 63rd and 58th Streets, as aforesaid, and excluded the said trustees from all right, title, and interest therein and from possession thereof, and the United States of America appropriated the said premises to its own use and has ever since retained possession of the same.

6. That thereafter and on or about May 31st, 1918, such portions of the hereinbefore described property as lay within the beds of proposed 63rd and 58th Streets, between 1st Avenue to the pierhead line, as laid out on the Land Map of the City of New York, such

streets not yet being opened, being strips of land respectively approximately sixty and thirty feet wide and eighteen hundred and eighty-two feet and eighteen hundred and twelve feet and seven inches long, and all right, title, and interest of the said trustees therein and thereto, were similarly requisitioned, commandeered and taken by the United States of America, acting through the President thereof as its duly authorized agent, for similar purposes, by supplementary requisition No. 202 B/C, under similar authority, and on May 31st, 1918, the United States of America took possession of said premises and excluded the said trustees from all right, title,
432 and interest therein and from possession thereof, and the United States of America appropriated the same to its own use and has ever since retained possession of the same.

7. That the President of the United States, acting pursuant to the provisions of section 10 of the act hereinbefore referred to, in and by the provisions of General Orders No. 30, duly promulgated by the War Department at Washington, District of Columbia, dated April 1st, 1918, duly constituted and composed in the said War Department a Board of Appraisers composed as therein set forth and charged with duties as therein described, among which duties were to determine by proper methods just compensation for all property requisitioned and commandeered or otherwise summarily taken over according to law for the direct and special use of the army; that thereafter and from time to time the said trustees attended before the Board of Appraisers constituted and composed by General Orders No. 30 hereinbefore referred to, and presented a claim for just compensation for the property requisitioned and commandeered as hereinbefore described, and such proceedings were had by such board that on or about May 2nd, 1919, the said board of appraisers made an award, being award No. 830, for requisitions Nos. 8 B/C and 202 B/C, as hereinbefore set forth, finding that the said property hereinbefore described, in two parcels containing respectively 472,786.1 sq. ft. and 1,241,541.9 sq. ft., was taken for public use, by the United States of America, on April 6th, 1918, and May 31st, 1912, respectively, and awarding to George F. Benedict and William H. Langley, as trustees as aforesaid, as just compensation for
433 their interest in said property, including the value thereof and damages arising out of the taking thereof, and all charges accrued against or on account of said property prior to the taking thereof, the sum of one million, seven hundred and ninety-six thousand, five hundred and twenty-two and 20/100 dollars ($1,796,522.20) with interest thereon at the rate of five per cent (5%) per annum from May 1st, 1918, to the date of voucher for final payment.

8. That the Board of Appraisers in making said award unjustly and wrongfully refused to allow compensation to the said trustees for certain strips or parcels of land situated within the boundaries of certain streets, 61st, 62nd, and 63rd Streets from the westerly side of First Avenue to New York Bay, laid out on the land map of the city of New York, though not yet opened, upon the ground that

said lands were not the property of the said trustees, but had been previously conveyed and delivered by the said trustees or their predecessors to the city of New York in trust for street purposes; that the amount of land in such proposed streets, for which said Board of Appraisers so refused to allow compensation, was eighty-one thousand one hundred and twenty (81,120) square feet.

9. That the sum of one million seven hundred ninety-six thousand five hundred twenty-two and 20/100 ($1,796,522.20) dollars is not just compensation to the owner of said property so requisitioned as aforesaid.

10. That thereafter the plaintiff duly notified the United States of America that the compensation so determined was not satis-
434 factory to the plaintiff, the plaintiff being the person entitled to receive the same, and rejected the said award and thereafter plaintiff, on or about the 11th day of July, 1918, was paid seventy-five per cent (75%) of the amount so determined by the said Board of Appraisers, to wit, the sum of one million three hundred and forty-seven thousand three hundred and ninety-six and 65/100 dollars ($1,347,396.65), with interest thereon at five per cent (5%) from May 1st, 1918, to said date of closing, July 11th, 1919, being the date of voucher for final payment, and the plaintiff conveyed the said property hereinbefore described in fee simple to the United States of America, free and clear of all liens and encumbrances, in consideration of said amount and such further sum as might be awarded by the United States court as just compensation therefor.

11. That prior to the said conveyance being accepted by the United States of America, the title to the property therein described and hereinbefore set forth had been duly examined by the legal authorities of the United States, who duly reported that the said property was duly vested in the said trustees as hereinbefore alleged, free and clear from all encumbrances, except as to the portions of the premises alleged to have been conveyed by the plaintiff's predecessors to the city of New York, by deed dated April 25th, 1899, being beds of alleged 61st, 62nd, and 63rd Streets from the westerly side of First Avenue to New York Bay, and for which no compensation was awarded by the said board.

12. At the time of the taking and appropriation of said property on April 6th, 1918, and May 31st, 1918, by the United States of America, the fair and reasonable market value thereof was the
435 sum of three million, four hundred and twenty-eight thousand, six hundred and forty-four dollars ($3,428,644).

13. That just compensation herein for the taking and appropriation of said property hereinbefore described by the United States of America for public use is the sum of three million four hundred twenty-eight thousand six hundred and forty-four dollars ($3,428,644), with interest thereon at the rate of six per cent (6%) per annum from the date of appropriation and dispossession of the owner therefrom.

14. That the date of the appropriation and dispossession of the owner of said property hereinbefore described was April 6th, 1918, except such portions thereof as were within the proposed limits of 58th and 63rd Streets from the westerly side of First Avenue to the pierhead line, such streets not yet being opened, amounting in area to one hundred sixty-seven thousand two hundred ninety-five and two hundred and forty-nine thousandths (167,295.249) square feet, and as to such last mentioned property the date of appropriation and dispossession of the owner was May 31st, 1918.

15. That on April 25th, 1899, the trustees of the Langley Estate executed and delivered a deed to the city of New York purporting to convey to the city of New York in trust, for street purposes, certain property, including real property within the boundaries of 61st, 62nd, and 63rd Streets if projected from the westerly line of First Avenue to the New York Bay.

16. That the consideration for such deed was the possible
436 future exemption of the remainder of said property owned by the said trustees from assessment on any future proceedings by the city of New York for the opening of said streets; that the property within the limits of 61st, 62nd, and 63rd Streets from the westerly line of First Avenue to New York Bay remained in the possession of the grantors; that such streets—61st, 62nd, and 63rd Streets—were not opened by the city of New York.

17. That the fair and reasonable market value of the said property requisitioned by the United States of America for public purposes at the time of such requisitions was three million four hundred twenty-eight thousand six hundred and forty-four dollars ($3,428,644), whether or not the city of New York held title to the lands within the proposed limits of 61st, 62nd, and 63rd Streets if projected from the westerly line of First Avenue to New York Bay in trust for street purposes.

18. That no part of the said sum of three million four hundred and twenty-eight thousand six hundred and forty-four dollars ($3,428,644) has been paid by the defendant, the United States of America, to the plaintiff except the sum of one million three hundred and forty-seven thousand three hundred and ninety-six and 65/100 dollars ($1,347,396.65), being an amount equal to seventy-five per cent (75%), with interest thereon at five per cent (5%) to the date of payment, July 11, 1918, of the said award of said Board of Appraisers.

. That the amount to be added to the said seventy-five per cent (75%) of said award, viz.: One million three hundred forty-
437 seven thousand three hundred and ninety-six dollars and 65/100 ($1,347,396.65) to make up an amount as will be just compensation for such property so requisitioned by the United States of America is the sum of two million eighty-one thousand two hundred forty-seven dollars and thirty-five cents ($2,081,247.35), with interest thereon at the rate of six per cent (6%) per annum on one million eight hundred seventy-eight thousand one hundred

and fifty dollars and ninety-two cents ($1,878,150.92) from April 6th, 1918, amounting at the date hereof to three hundred and nine thousand five hundred and eighty-one dollars and 88/100 ($309,581.88); and on two hundred and three thousand and ninety-six dollars and forty-three cents ($203,096.43) from May 31st, 1918, amounting at the date hereof to thirty-one thousand six hundred and fifteen dollars and thirty-four cents ($31,615.34).

20. That in addition, the amount to be added to the said seventy-five per cent (75%) of said award, to make up an amount which will be just compensation for such property, is the sum of one per cent per annum on seventy-five per cent (75%) of said award, to wit: One million three hundred and forty-seven thousand three hundred and ninety-six dollars and sixty-five cents ($1,347,396.65) from April 6th, 1918, to July 11th, 1919, amounting to seventeen thousand and twenty-nine dollars and sixty cents ($17,029.60).

21. That the total amount to be added to the said seventy-five per cent of said award to make up an amount which will be just compensation for such property so taken and appropriated for public use by the United States of America is the sum of two million four
438 hundred thirty-nine thousand four hundred seventy-four and seventeen one-hundredths dollars ($2,439,474.17).

22. That the city of New York is a municipal corporation existing under the laws of the State of New York.

23. That the city of New York had no right, title, or interest in and to any of the hereinbefore described property at the time of the appropriation thereof.

24. That the last will and testament of William C. Langley, late of the county of Kings, who died on or about December 1, 1890, is dated February 8, 1890, and is as follows:

"In the Name of God, Amen:

"I, William C. Langley, of the city of New York, merchant, do make, publish, and declare this my last will and testament.

"First. I give and bequeath to my son, William H. Langley, one million dollars.

"Secondly. I give and bequeath to Charles C. Goodrich, who now is and for many years has been my partner in business, one hundred thousand dollars.

"Thirdly. I give and bequeath to Alice M. Bowker (who for many years has resided in my family) an annuity of three thousand dollars, to be paid to her by my executors anl trustees in quarter-yearly payments of seven hundred and fifty dollars each, the first payment to be made three months after

439 "I direct my executors within six months after the probate of this will to execute an instrument in writing whereby they shall designate three full blocks of my lands in the town of New Utrecht, Kings County, New York, lying between Sixty-third and Sixty-fifth Streets and Third and Fourth Avenues as laid down in the plot of New Utrecht, being continuations of the same streets and

avenues as laid down on the map of the city of Brooklyn, and I charge the said annuity as a lien on the three blocks so designated. My executors and trustees may, however, at any time in their discretion sell and dispose of the said three blocks or any part thereof, and in case of such sale or other disposition the lien above created shall cease and the portions sold or disposed of shall, after such sale or disposition, be free therefrom. They shall, however, substitute in lieu of the lands so released, other lands or securities of equal value.

"I authorize Alice W. Bowker with the concurrence and approbation of my executors to select from my personal effects such articles as she may require for her personal use. And I give and bequeath to her the articles so selected, such selections to be made by her within three months next after the probate of this my will.

"I desire my executors to keep my burial plot in the cemetery at Medfield, Massachusetts, in good order, and I authorize them from time to time to expend for that purpose and for improving
440 and embellishing the same such sums as in their judgment may be proper. In case my son shall wish that his remains or those of his wife and children shall be buried in said plot, I authorize such burial. I also authorize the burial of Alice M. Bowker in said plot if such should be her desire.

"Fourthly. If Henry L. Kemp now in my service shall be so employed at the time of my death, I give and bequeath unto him the sum of five thousand dollars.

"Fifthly. I give, devise, and bequeath all the rest, and residue of my property of every kind and character, wheresoever situate and that may remain after the payment of my debts and the legacies hereinbefore given to my executors and trustees hereinafter named, to be by them held in trust; that is to say, in trust during the life of my son, William H. Langley, as to my real estate to demise and let the same from time to time, and as to personal estate, to invest, manage, and control the same in their discretion, and to collect and receive the income thereon, and after defraying all charges theron to pay the net income when received to my said son, during his life. And at the death of my son, to assign, transfer, and pay whatever may then be held under this trust to his children who may survive him, so that each of his children shall receive an equal share thereof.

"I hereby authorize and empower my said executors and trustees and their successor and successors, to sell at their discretion as
441 to the time and terms and at public and private sale, all and every part of my real estate, and to execute and deliver all necessary and proper assurances and conveyances for the same to the respective purchasers thereof.

"I nominate, constitute, and appoint my son, William H. Langley, and my friend, Charles C. Goodrich, to be executors of and trustees under this, my last will and testament, and I desire and hereby request that they shall not be required by reason of nonresidence in this State or for any other reason, to give any bond or security either as executors or trustees.

"My will is that my said executors and trustees shall not charge or receive any commissions or compensation for their services as executors or trustees. I have had this in my mind in making the bequests herein contained in their favor.

"Lastly. I hereby revoke all other wills by me made.

"In witness whereof I have hereunto subscribed my name at the city of New York on the eighth day of February, one thousand eight hundred and ninety, in the presence of B. F. Dunning, F. P. Fowler, and Wm. F. Dunning, attesting and subscribing witnesses at the same time declaring this to be my last will and testament.

"WM. C. LANGLEY. [L. S.]

"Subscribed by the testator in the presence of us and de-
442 clared by him at the time of making such subscription to be his last will and testament, whereupon we at his request in his presence and in the presence of each other, have subscribed our names as witnesses, attesting the execution thereof, this certificate having been first read aloud to the testator in his and our presence and hearing.

"On the third page in the fourth line the words 'wife' 'and' were interlined before execution.

"B. F. DUNNING, *37 West 38th Street.*
"THOMAS P. FOWLER, *39 East 68th Street.*
"W. F. DUNNING, *214 West 44th Street.*"

Conclusions of law.

1. That at the time of appropriation thereof by the United States of America, William H. Langley and George F. Benedict, as trustees of the trusts created by the last will and testament of William C. Langley, deceased, were the owners in fee and duly seized and possessed of the following described property, situate, lying, and being in the borough of Brooklyn, city of New York, and State of New York, and situated within the jurisdiction of the United States District Court for the Eastern District of New York, described as follows:

"All those certain lots, pieces, or parcels of land situate, lying, and being in the borough of Brooklyn, county of Kings, State and city of New York, more particularly described as follows:

443 "Parcel No. 1.

"Beginning at the point of intersection of the westerly line of First Avenue and the center line of Fifty-eighth Street; running thence westerly along the centre line of 58th Street and its prolongation eighteen hundred and twelve (1812) feet and seven inches (7) more or less to the pierhead line established by chapter 491 of the laws of the State of New York of 1884 and approved by the Secretary of War on March 4th, 1890; thence south-

erly along said pierhead line two hundred and sixty feet (260) and four inches (4) to a point opposite the prolongation of the center nue two hundred and sixty *feet* (260) feet and four inches (4) more ninth Street and its prolongation eighteen hundred and nineteen feet and seven inches (7) more or less to the westerly line of First Avenue; and thence northerly along the westerly line of First Avenue two hundred and sixty *feet* (260) feet and four inches (4) more or less to the point or place of beginning, containing approximately four hundred and seventy-two thousand seven hundred and eighty and one-tenth (472,780.1) square feet.

"Parcel No. 2.

"All that certain lot, piece, or parcel of land beginning at the point of intersection of the westerly line of First Avenue and the southerly line of Sixty-third Street and its prolongation; running thence northerly along the westerly line of First Avenue six
444 hundred and sixty-eight (668) feet and one (1) inch to a point one hundred and eighteen feet and one inch northerly from the centre line of Sixty-first Street; running thence westerly at right angles to the westerly line of First Avenue eighteen hundred and thirty-four (1834) feet and five and one-half inches (5½) more or less to the pierhead line above described; thence southerly along said pierhead line approximately six hundred and sixty-eight (668) feet to a point on said pierhead line formed by the intersection therewith of the southerly line of 63rd St., prolonged; thence easterly along the southerly line of 63rd Street prolonged eighteen hundred and eighty-two (1882) feet three and three-eighths inches (3⅜) more or less to the point of beginning, containing approximately one million two hundred and forty-one thousand five hundred forty-one and nine-tenths (1,241,541.9) square feet."

2. That the plaintiff is entitled to receive from the United States of America a sum, which added to said seventy-five per cent of the award herein, will be just compensation for the taking and appropriation of the property hereinbefore described.

3. That just compensation for the property hereinbefore described is the fair and reasonable market value thereof at the date of appropriation.

4. That the fair and reasonable market value of the property of the plaintiff hereinbefore described at the time of the appropriation was three million four hundred twenty-eight thousand six hundred and forty-four dollars ($3,428,644).

445 5. That the amount to be added to said sum of seventy-five per cent of the award herein, to make just compensation by the United States of America for the property hereinbefore described is two million, eighty-one thousand, two hundred forty-seven and 35/100 dollars ($2,081,247.35), with interest thereon at the rate of six per cent per annum on one million, eight hundred and seventy-eight

thousand, one hundred and fifty dollars and ninety-two cents ($1,878,150.92) from April 6th, 1918, amounting at the date hereof to three hundred and nine thousand, five hundred eighty-one dollars and eighty-eight cents ($309,581.88); and on two hundred and three thousand and ninety-six dollars and forty-three cents ($203,096.43) from May 31st, 1918, amounting at the date hereof to thirty-one thousand six hundred and fifteen dollars and thirty-four cents ($31,615.34); and the sum of seventeen thousand and twenty-nine dollars and sixty cents ($17,029.60), totaling two million, four hundred and thirty-nine thousand four hundred and seventy-four dollars and seventeen cents ($2,439,474.17).

6. That the conveyance by the trustees to the city of New York on April 25th, 1899, hereinbefore referred to, was not such a sale as the trustees had power to make under the will of William C. Langley, hereinbefore referred to, and was void.

7. That the city of New York had no right, title, or interest in the hereinbefore described property, or any part thereof, at the time of the taking thereof.

8. That the plaintiff should have judgment against the
446 United States of America for two million four hundred and thirty-nine thousand four hundred and seventy-four dollars and seventeen cents ($2,439,474.17), together with the costs and disbursements incurred in this action.

I direct the entry of judgment accordingly.

Dated, Post Office Building, Borough of Brooklyn, city of New York, January 5th, 1921.

EDWIN L. GARVIN,
*United States Judge.*

447 *Proposed findings of fact and conclusions of law of the United States of America.*

United States District Court, Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA AND THE CITY OF NEW YORK, defendants.

The issue of fact in the above-entitled action having regularly come on for trial before the undersigned at a term of this court held in the Post Office Building, borough of Brooklyn, city of New York, on the days of May, 1920, and the parties having stipulated in writing that a jury herein be waived, and said stipulation having been filed with the clerk, and the plaintiff having appeared herein by Gannon, Seibert & Riggs, Esqs., his attorneys (Wil-

liam H. Seibert and Royal E. T. Riggs, of counsel), and the United States of America by Leroy W. Ross, United States attorney (Charles J. Buchner, of counsel), and the city of New York by William P. Burr, corporation counsel (E. J. Kenny, of
448 counsel), and the allegations and proofs of the parties having been heard, I do hereby find as follows:

1. The United States of America is a sovereign power. Allowed. E. L. G.

2. That the Board of Appraisers rightfully excluded from the award to the plaintiff herein the land lying in the beds of 61st, 62nd and 63rd Streets, from First Avenue to the high water mark. Not found. E. L. G.

3. That the sum of $1,796,522.20 was the fair and reasonable market value of the real estate belonging to the Langley estate on the date of the appropriation. Not found. E. L. G.

4. That the said sum of $1,796,522.20 was just compensation to the owner for the said property, which said property was taken for public purposes. Not found. E. L. G.

5. That the Board of Appraisers in making the award of $1,796,522.20 allowed just compensation for the property taken for public purposes. Not found. E. L. G.

6. That the trustees of the Langley estate as a consideration for the deed to the city of New York of the property comprised within the limits of 61st, 62nd and 63rd Streets received as consideration a release from prospective assessments for the opening of the said streets of the land belonging to the estate within the area of assessment. Not found, except as found for plaintiff. E. L. G.

7. That the plaintiff is not entitled to any interest on the money which he has accepted, to wit, the sum of $1,347,396.65. Not found. E. L. G.

449. 8. That the defendant is entitled to interest on the unpaid balance of $440,126.55 from the 6th day of April, 1918, to the 11th day of July, 1919. Not found. E. L. G.

9. That the plaintiff is entitled to a judgment for the sum of $471,581.83, and as a conclusion of law I find: Not found. E. L. G.

First. The plaintiff is entitled to judgment for the sum of $471,581.83. Not found. E. L. G.

Second. That the fair and reasonable market value of the property of the plaintiff, on the date of appropriation, was $1,796,522.20. Not found. E. L. G.

Third. That the city of New York has the title to the property within the bed of 61st, 62nd, and 63rd Streets from First Avenue to the pier-head line. Not found. E. L. G.

Fourth. That the plaintiff should have judgment against the United States for the sum of $471,581.83. Not found. E. L. G.

*United States District Judge.*

450 *Proposed findings of fact and conclusions of law of the City of New York.*

United States District Court for the Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA AND THE CITY OF NEW YORK, defendants.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The defendant, The City of New York, hereby submits to the court the following proposed findings of fact and conclusions of law:

Findings of fact.

I.

That the defendant, United States of America, is a sovereign power.

Allowed. E. L. G.

451 II.

That the defendant, The City of New York, is a municipal corporation duly organized and existing under and by virtue of the laws of the State of New York.

Allowed. E. L. G.

III.

That on and prior to April 25, 1899, William H. Langley and Charles C. Goodrich, as trustees of and under the last will and testament of William C. Langley, deceased, were the owners in fee simple absolute and were duly seized and possessed of the lands embraced within the lines of 61st Street, 62nd Street, and 63rd Street from the westerly side of First Avenue to the New York Bay, in the Borough of Brooklyn, City of New York.

Allowed. E. L. G.

IV.

That said streets were, on and prior to April 25, 1899, and ever since, have been laid down and shown on the map or plan of The City of New York.

Allowed. E. L. G.

V.

That 61st Street from the westerly side of First Avenue to the New York Bay, comprised on and prior to April 25, 1899, and ever since has comprised all the land within the lines of said street in an entire block in extent.

Not found. E. L. G.

452

VI.

That 62nd Street from the westerly side of First Avenue to the New York Bay comprised on and prior to April 25, 1899, and ever since has comprised all the land within the lines of said street in an entire block in extent.

Not found. E. L. G.

VII.

That 63rd Street from the westerly side of First Avenue to the New York Bay comprised on and prior to April 25, 1899, and ever since has comprised all the land within the lines of said street in an entire block in extent.

Not found. E. L. G.

VIII.

That said trustees made an affidavit on April 25, 1899, that they as trustees were on said date the owners of 61st Street, 62nd Street, and 63rd Street from the westerly side of First Avenue to the New York Bay, and that said lands were on said date free and clear of all encumbrances.

Allowed. E. L. G.

IX.

That by certificate dated May 2, 1899, the Title Guarantee and Trust Company certified that title to the lands lying within the limits of said streets from the westerly side of First Avenue to the New York Bay could be conveyed by said trustees free and clear of all encumbrances and that said trustees had full right to convey the same.

Allowed. E. L. G.

453

X.

That on April 25, 1899, the said trustees duly executed and deliv ered to John Whalen, the then corporation counsel of the city of New York, a deed granting and conveying to the city of New York the fee, impressed with a trust for street purposes, of the lands included within the limits of 61st Street, 62nd Street, and 63rd Street from the westerly side of First Avenue to the New York Bay.

Not found, except as found for plaintiff. E. L. G.

XI.

That on May 3, 1899, said corporation counsel caused said deed to be recorded in the office of the register of the county of Kings, and on or about June 21, 1899, filed said deed with the comptroller of the city of New York.

Allowed. E. L. G.

XII.

That 61st Street and 62nd Street from the westerly side of First Avenue to the New York Bay were on or about April 6, 1918, and 63rd Street from the westerly side of First Avenue to the New York Bay was on or about May 31, 1918, requisitioned, commandeered, and taken by the United States of America for an Army supply base and expeditionary depot, to provide facilities for the storage of supplies connected with the common defense, and said United States of America has ever since retained possession of said streets.

Found. E. L. G.

454 Conclusions of law.

I.

That the defendant, The City of New York, by virtue of the deed mentioned in Finding of Fact X, was on April 25, 1899, and ever since has been vested with the fee, impressed with a trust for street purposes of the lands included within the limits of 61st Street, 62nd Street, and 63rd Street from the westerly side of First Avenue to the New York Bay.

Not found. E. L. G.

II.

That the defendant, The City of New York, is entitled to judgment dismissing the complaint, together with costs.

Not found. E. L. G.

Dated, New York, December 20, 1920.

455 *Proposed supplementary findings of fact and conclusions of law of the city of New York.*

United States District Court for the Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF THE trusts created by the last will and testament of William C. Langley, deceased, plaintiff.
*against*
UNITED STATES OF AMERICA AND THE CITY OF NEW York, defendants.

SUPPLEMENTARY PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The defendant, The City of New York, hereby submits to the court the following supplementary proposed findings of fact and conclusions of law:

Findings of fact.

XIII.

That on and prior to April 25, 1899, William H. Langley and Charles C. Goodrich as trustees of and under the last will and testament of William C. Langley, deceased; were the owners and

456 were duly seized and possessed of the lands embraced within the lines of 61st Street, 62nd Street, and 63rd Street from the westerly side of First Avenue to the pierhead line established by chapter 491 of the Laws of the State of New York of 1884 and approved by the Secretary of War on March 4th, 1890.

Allowed. E. L. G.

XIV.

That said streets were on and prior to April 25, 1899, and ever since have been laid down and shown on the map or plan of the city of New York.

Allowed. E. L. G.

XV.

That 61st Street from the westerly side of First Avenue to the aforesaid pierhead line, comprised on and prior to April 25, 1899, and ever since, has comprised all the land within the lines of said street in two entire blocks in extent.

Allowed. E. L. G.

XVI.

That 62nd Street from the westerly side of First Avenue to the aforesaid pierhead line, comprised on and prior to April 25, 1899, and ever since, has comprised all the land within the lines of said street in two entire blocks in extent.

Allowed. E. L. G.

457 XVII.

That 63rd Street, from the westerly side of First Avenue to the aforesaid pierhead line, comprised on and prior to April 25, 1899, and ever since has comprised all the land withn the lines of said street in two entire blocks in extent.

Allowed. E. L. G.

XVIII.

That said trustees made an affidavit on April 25, 1899, that they as trustees were on said date the owners of 61st Street, 62nd Street and 63rd Street, from the westerly side of First Avenue to the aforesaid pierhead line, and that said lands were on said date free and clear of all encumbrances.

Refused. E. L. G.

XIX.

That by certificate dated May 2, 1899, the Title Guarantee and Trust Company certified that title to the lands lying within the limits of said streets, from the westerly side of First Avenue to the aforesaid pierhead line, could be conveyed by said trustees free and clear of all encumbrances and that said trustees had full right to convey the same.

Refused. E. L. G.

XX.

That on April 25, 1899, the said trustees duly executed and delivered to John Whalen, the then corporation counsel of the city
458 of New York, a deed granting and conveying to the city of New York the fee, impressed with a trust for street purposes, of the lands included within the limits of 61st Street, 62nd Street and 63rd Street, from the westerly side of First Avenue to the aforesaid pierhead line.

Refused. E. L. G.

XXI.

That 61st Street and 62nd Street, from the westerly side of First Avenue to the aforesaid pierhead line, were on or about April 6, 1918, and 63rd Street, from the westerly side of First Avenue to the aforessaid pierhead line, was on or about May 31, 1918, requisitioned, commandeered and taken by the United States of America for an army supply base and expeditionary depot, to provide facilities for the storage of supplies connected with the common defense, and said United States of America has ever since retained possession of said streets.

Allowed. E. L. G.

Conclusions of law.

1-A.

That the defendant, The City of New York, by virtue of the deed mentioned in Findings of Fact X and XX was on April 25, 1899, and ever since has been vested with the fee, impressed with a trust for street purposes, of the lands included within the limits
459 of 61st Street, 62nd Street and 63rd Street, from the westerly side of First Avenue to the pierhead line established by chapter 491 of the Laws of the State of New York of 1884 and approved by the Secretary of War on March 4, 1890.

Refused. E. L. G.

Dated, New York, January 3, 1921.

460 *Request of the United States of America for findings of fact and conclusions of law proposed by the city of New York.*

United States District Court for the Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA AND THE CITY OF NEW York, defendants.

SIR: Please take notice that the United States of America, defendant above named, joins in the request for the findings set out

in the proposed findings of fact and conclusions of law submitted by the defendant The City of New York the same as if the
461 findings of fact and conclusions of law had been specifically submitted by the said defendant.

Yours, etc.,

LEROY W. ROSS,
*United States Attorney for the Eastern District of New York. Attorney for Defendant, United States of America.*

To Messrs. GANNON, SEIBERT & RIGGS,
*Attorneys for Plaintiff, Office and Post Office Address, 2 Rector Street, New York.*

Honorable JOHN P. O'BRIEN,
*Corporation Counsel, Municipal Building, Borough of Manhattan, City of New York.*

PERCY G. B. GILKES, Esq.,
*Clerk, U. S. District Court, Eastern District of New York, Room #301, Post Office Building, Brooklyn, New York.*

462 *Exceptions to findings of fact and conclusions of law by the United States of America.*

United States District Court, Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF THE trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA AND THE CITY OF NEW York, defendants.

SIRS: Please take notice that the defendant the United States of America excepts to the findings of fact and conclusions of law as submitted, as follows:

1. The defendant United States of America excepts to the fourth finding of fact upon the ground that there is no evidence to sustain the same as to parcel No. 2.

2. The defendant United States of America excepts to the eight finding of fact upon the ground that there is no evidence to sustain the same, except as to the last portion of the finding which
463 states that eighty-one thousand one hundred and twenty (81,120) square feet was the amount of land in the proposed streets.

3. The defendant, United States of America, excepts to the ninth finding of fact upon the ground that there is no evidence to sustain the same.

4. The defendant, United States of America, excepts to the twelfth finding of fact upon the ground that there is no evidence to sustain the same.

5. The defendant, United States of America, excepts to the thirteenth finding of fact upon the ground that there is no evidence to sustain the same.

6. The defendant, United States of America, excepts to so much of the sixteenth finding of fact which sets out that the property within the limits of 61st, 62nd, and 63rd Streets, from the westerly line of First Avenue to New York Bay, remains in the possession of the grantors, upon the ground that there is no evidence to sustain the same.

7. The defendant, United States of America, excepts to the seventeenth finding of fact upon the ground that there is no evidence to sustain the same and upon the ground that the said finding of fact is indefinite and hypothetical.

8. The defendant, United States of America, excepts to the nineteenth finding of fact upon the ground that there is no evidence to sustain the same.

9. The defendant, United States of America, excepts to the
464 twentieth finding of fact upon the ground that there is no evidence to sustain the same.

10. The defendant, United States of America, excepts to the twenty-first finding of fact upon the ground that there is no evidence to sustain the same.

11. The defendant, United States of America, excepts to the twenty-third finding of fact upon the ground that there is no evidence to sustain the same.

12. The defendant, United States of America, excepts to the first conclusion of law, or so much of the first conclusion of law as sets out that the trustees of the estate of William C. Langley were seized of parcel 2 at the time of the appropriation thereof by the United States.

13. The defendant, United States of America, excepts to the fourth conclusion of law.

14. The defendant, United States of America, excepts to the fifth conclusion of law.

15. The defendant, United States of America, excepts to the sixth conclusion of law.

16. The defendant, United States of America, excepts to the seventh conclusion of law.

17. The defendant, United States of America, excepts to the eighth conclusion of law.

18. The defendant, United States of America, excepts to the ninth conclusion of law.

19. The defendant, United States of America, excepts to the refusal to find as set out in its second proposed finding of fact.

465 20. The defendant United States of America excepts to the refusal to find as set out in its third proposed finding of fact.

21. The defendant United States of America excepts to the refusal to find as set out in its fourth proposed finding of fact.

22. The defendant United States of America excepts to the refusal to find as set out in its fifth proposed finding of fact.

23. The defendant United States of America excepts to the refusal to find as set out in its sixth proposed finding of fact.

24. The defendant United States of America excepts to the refusal to find as set out in its seventh proposed finding of fact.

25. The defendant United States of America excepts to the refusal to find as set out in its eighth proposed finding of fact.

26. The defendant United States of America excepts to the refusal to find as set out in its ninth proposed finding of fact.

27. The defendant United States of America excepts to the refusal to find as set out in its first proposed conclusion of law.

28. The defendant United States of America excepts to the refusal to find as set out in its second proposed conclusion of law.

466 30. The defendant United States of America excepts to the refusal to find as set out in its fourth proposed conclusion of law.

31. The defendant United States of America excepts to the refusal to find as set out in its fifth proposed finding of fact as submitted by the defendant The City of New York and joined in by this defendant United States of America.

32. The defendant United States of America excepts to the refusal to find as set out in its sixth proposed finding of fact as submitted by the defendant The City of New York and joined in by this defendant United States of America.

33. The defendant United States of America excepts to the refusal to find as set out in its seventh proposed finding of fact as submitted by the defendant The City of New York and joined in by this defendant United States of America.

34. The defendant United States of America excepts to the refusal to find as set out in its tenth proposed finding of fact as submitted by the defendant The City of New York and joined in by this defendant United States of America upon the ground that the finding as proposed by the plaintiff and found by the court does not find the facts as set out by the evidence and as set out in the proposed tenth finding of fact submitted by the defendant The City of New York and joined in by the defendant United States of America.

35. The defendant United States of America excepts to the refusal to find as to the first proposed conclusion of law submitted by
467 the defendant The City of New York and joined in by the defendant United States of America.

36. The defendant United States of America excepts to the refusal to find as to the second proposed conclusion of law submitted by the defendant The City of New York and joined in by the defendant, United States of America.

37. The defendant, United States of America, excepts to the refusal to find as to the proposed conclusion of law designated as 1–A, submitted by the defendant, The City of New York, and joined in by the defendant, United States of America.

38. The defendant, United States of America, excepts to the refusal to find as to the eighteenth proposed finding of fact as submitted by the defendant, The City of New York, and joined in by the defendant, United States of America.

39. The defendant United States of America excepts to the refusal to find as to the nineteenth proposed finding of fact as submitted by the defendant, The City of New York, and joined in by the defendant, United States of America.

40. The defendant, United States of America, excepts to the refusal to find as to the twentieth proposed finding of fact as submitted by the defendant, The City of New York, and joined in by the defendant, United States of America.

Yours, etc.,

LEROY W. ROSS,
*U. S. Attorney for the Eastern District of New York, Attorney for Defendant, United States of America.*

468 *Exceptions to findings of fact and conclusions of law by the City of New York.*

United States District Court for the Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA AND THE CITY OF NEW York, defendants.

The defendant The City of New York respectfully excepts to the plaintiff's findings of fact and conclusions of law as follows:

First. To the finding of fact marked "4."

Second. To the finding of fact marked "8."

Third. To the finding of fact marked "23."

And the defendant, The City of New York, respectfully excepts to the plaintiff's conclusions of law, as follows:

First. To the conclusion of law marked "1."

Second. To the conclusion of law marked "6."

469 Third. To the conclusion of law marked "7."

And the defendant The City of New York further respectfully excepts to the refusal of the court to make findings of fact and of law on its behalf:

First. To the refusal of the court to make the finding of fact submitted on behalf of the said defendant marked "V."

Second. To the refusal of the court to make the finding of fact submitted on behalf of the said defendant marked "VI."

Third. To the refusal of the court to make the finding of fact submitted on behalf of the said defendant marked "VII."

Fourth. To the refusal of the court to make the finding of fact submitted on behalf of the said defendant marked "X."

Fifth. To the refusal of the court to make the finding of fact submitted on behalf of the said defendant marked "XVIII."

Sixth. To the refusal of the court to make the finding of fact submitted on behalf of the said defendant marked "XIX."

Seventh. To the refusal of the court to make the finding of fact submitted on behalf of the said defendant marked "XX."

And the defendant The City of New York respectfully excepts to the refusal of the court to make the findings or conclusions of law in behalf of said defendant, as follows:

470 First. To the refusal of the court to find conclusion of law marked "I."

Second. To the refusal of the court to find conclusion of law marked "IA."

Third. To the refusal of the court to find conclusion of law marked "II."

JOHN P. O'BRIEN,
*Corporation Counsel, Attorney for Defendant The City of New York, Office and Post Office Address, Municipal Building, Borough of Manhattan, New York City.*

471 *Stipulation waiving jury trial.*

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trusts created by the last will and testament of William C. Langley, deceased, plaintiff,

*against*

UNITED STATES OF AMERICA AND THE CITY OF NEW YORK, defendants.

It is hereby stipulated, consented, and agreed by and between the respective attorneys for the parties hereto that any of the rights had by any of the parties hereto to a trial by jury are hereby waived, and that the case may proceed to trial and be disposed of before the Hon. Edwin L. Garvin, United States district judge, without a jury.

Dated, May 10th, 1920.

GANNON, SEIBERT & RIGGS,
*Attorneys for Plaintiff.*
LEROY W. ROSS,
*United States Attorney.*
JOHN P. O'BRIEN,
*Corporation Counsel.*

472 *Order settling bill of exceptions.*

For as much as the exceptions, matters, and things would not otherwise appear in the record, I have settled and signed this bill of exceptions, and it is hereby ordered that the same be filed as a part of the record herein nunc pro tunc as of the date of the trial.

Dated, Brooklyn, N. Y., June 20, 1921.

EDWIN L. GARVIN,
*United States District Judge.*

473 *Order of substitution.*

At the chambers of the United States District Court for the Eastern District of New York, held in the Federal Building, Borough of Brooklyn, city of New York, on the 1st day of April, 1921.

Present: Hon. Edwin L. Garvin, United States district judge.

GEORGE F. BENEDICT AS SOLE SURVIVING TRUSTEE OF THE trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA AND THE CITY OF NEW York, defendants.

Upon the annexed consent it is

Ordered that the name of John F. O'Brien, assistant corporation counsel, be substituted as the attorney for the defendant The City of New York in the above-entitled action in the name, place, and stead of John P. O'Brien, corporation counsel.

EDWIN L. GARVIN,
*United States District Court Judge.*

474 I hereby consent that John F. O'Brien, assistant corporation counsel, be substituted as attorney for the city of New York in the place and stead of John P. O'Brien, corporation counsel.

Dated April 1, 1921.

JOHN P. O'BRIEN,
*Corporation Counsel.*

475 *Petition for writ of error by the United States of America.*

United States District Court, Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF THE trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA AND THE CITY OF NEW York, defendants. } L. #932.

Now comes United States of America, one of the defendants herein, and says that on or about the 5th day of January, 1921, this court entered judgment herein in favor of the plaintiff and against this defendant in which judgment, and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in its behalf to the United States Circuit Court of Appeals for the Second Circuit for the correction of errors so complained of

476 and that a transcript of the record, proceedings, and papers in this cause duly authenticated may be sent to the said Circuit Court of Appeals.

Dated, 1st day of April, 1921.

LEROY W. ROSS,
*United States Attorney, Eastern Dist. of New York,*
*Attorney for Defendant United States of America.*

477 *Assignment of errors by the United States of America.*

United States District Court, Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF THE trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA AND THE CITY OF NEW YORK, defendants.
} L. #932.

And now on this the 29th day of March, A. D. 1921, came the defendant United States of America, by its solicitor, Leroy W. Ross, and says that the judgment entered in the above cause on the 5th day of January, 1921, is erroneous and unjust to the defendant, United States of America.

First. The trial court erred in admitting over the objection of the defendant United States of America testimony of the plaintiff's witness, Charles E. Trout, as follows:

"Q. Are you familiar with the character of soil added by excavation to lands around high-water mark upon New York Harbor and upon the bay?

"A. I am.

478 "Q. Was this soil which you excavated for the United States Government of that character?

"A. It was not.

"Mr. BUCHNER. Objected to. I do not think that is material.

"The COURT. Objection overruled.

"Mr. BUCHNER. Exception."

Second. The trial court erred in admitting over the objection of the defendant United States of America the testimony of the plaintiff's witness Thomas T. Graham, as follows:

"Q. Do you know of an application made by W. R. Grace & Company to Commissioner of Land Office for a grant of land under water?

"Mr. BUCHNER. I object unless the date of it is fixed.

"Q. About the year 1913 or '14?

"Mr. BUCHNER. Objected to. That is entirely too far away to be material.

"The COURT. Overruled.

"Mr. BUCHNER. Exception."

Third. The trial court erred in admitting over the objection of the defendant United States of America the testimony of the plaintiff's witness David Porter, as follows:

"Q. What, in your opinion, would be the best use to which a strip of property extending from westerly side of the First Avenue to the pierhead line 185 feet wide could be put?

479 "Mr. BUCHNER. I object to this. It is one of two things. It is not proper redirect, or else an attempt to cross-examine his own witness.

"The COURT. On the first ground I will permit the question, and on the second ground it is overruled.

"Mr. BUCHNER. I think you should make that more definite."

Fourth. In denying the defendant's, United States of America, motion to strike out the testimony of the plaintiff's witness Charles J. Farley.

Fifth. In permitting a plan, plaintiff's Exhibit T, to be received in evidence.

Sixth. The trial court erred in admitting over the objection of the defendant United States of America testimony of the plaintiff's witness Charles J. Farley, as follows:

"Q. Mr. Farley, will you please tell me the units used by you of construction as obtained by the dock department and from Mr. Trout in figuring the cost of improvement in accordance with the plan Exhibit T in evidence?

"Mr. BUCHNER. I object to that on the ground it is clearly hearsay.

"The COURT. Objection overruled.

"Mr. BUCHNER. Exception.

"The COURT. I will take it upon statement of counsel that it will be connected."

480 Also:

"Q. What was the total cost of construction of piers that you relied upon in making your computation as given you by Mr. Trout?

"A. The cost of improving both parcels, $2,384,501.

"Q. Now, Mr. Farley, based upon your knowledge of conditions throughout the harbor and leases of property as improved, what in your opinion was the rental value of the total Langley property as improved?

"Mr. BUCHNER. I object to that. I think it ought to be——

"The COURT. Objection overruled.

"Mr. BUCHNER. Exception."

Seventh. In permitting the testimony of the plaintiff's witness Charles J. Farley to stand and overruling the witness's motion to strike out said testimony.

Eighth. The trial court erred in refusing, over the objection of the defendant United States of America to allow the testimony of the plaintiff's witness Lewis H. Pounds, as follows:

"Q. Fixing the value as of December, 1918?

"A. No; that value was fixed as of the date of the appropriation, which, as I recall it, was nineteen twelve.

"Q. What value did you put on it?

"A. One dollar and sixty-five cents a square foot.

"Q. How much was officially determined, do you know?

481 "Mr. RIGGS. Objected to as incompetent, improper, not proper evidence of value.

"The COURT. Objection sustained.

"Mr. BUCHNER. Exception."

Ninth. The trial court erred in refusing to grant the motion made by the defendant, United States of America, at the end of plaintiff's case to dismiss the complaint.

Tenth. The trial court erred in denying the motion made by the defendant, United States of America, to dismiss plaintiff's cause of action at the end of the case.

Eleventh. The trial court erred in allowing the following findings of fact:

"4. That for many years prior to April 6th, 1918, and on said date William H. Langley and George F. Benedict, as trustees as aforesaid, were the owners in fee, and were duly seized and possessed of the following described property, situate, lying, and being in the Borough of Brooklyn, city of New York, and State of New York, and situated within the jurisdiction of the United States District Court for the Eastern District of New York, so devised in trust by William C. Langley, as hereinafter set forth:

"'All those certain lots, pieces, or parcels of land situate, lying, and being in the borough of Brooklyn, County of Kings, city and State of New York, more particularly described as follows:

482 "'PARCEL No. 1.

"'Beginning at the point of intersection of the westerly line of First Avenue and the center line of Fifty-eighth Street; running thence westerly along the center line of 58th Street and its prolongation eighteen hundred and twelve (1,812) feet and seven (7) inches more or less to the pierhead line established by chapter 491 of the Laws of the State of New York of 1884 and approved by the Secretary of War on March 4th, 1890; thence southerly along said pierhead line two hundred and sixty (260) feet and four (4) inches to a point opposite the prolongation of the center line of 59th Street; thence easterly along the center line of Fifty-ninth Street and its prolongation eighteen hundred and nineteen (1,819) feet and seven (7) inches more or less to the westerly line of First Avenue; and thence northerly along the westerly line of First Avenue two hundred and sixty (260) feet and four (4) inches more or less to the point or place of beginning, containing approximately four hundred and seventy-two thousand seven hundred and eighty and one-tenth (472,780.1) square feet.

"'PARCEL No. 2.

"'All that certain lot, piece, or parcel of land beginning at the point of intersection of the westerly line of First Avenue and the southerly line of Sixty-third Street and its prolongation;
483 running thence northerly along the westerly line of First Avenue six hundred and sixty-eight (668) feet and one (1) inch to a point one hundred and eighteen feet and one inch northerly from the center line of Sixty-first Street; running thence westerly at right angles to the westerly line of First Avenue eighteen hundred and thirty-four (1,834) feet and five and one-half (5½) inches more or less to the pierhead line above described; thence southerly along said pierhead line approximately six hundred and sixty-eight (668) feet to a point on said pierhead line formed by the intersection therewith of the southerly line of 63rd St. prolonged; thence easterly along the southerly line of 63rd St. prolonged eighteen hundred and eighty-two (1,882) feet three and three-eighths (3⅜) inches more or less to the point of beginning, containing approximately one million two hundred and forty-one thousand five hundred and forty-one and nine-tenths (1,241,541.9) square feet.'

"8. That the board of appraisers in making said award unjustly and wrongfully refused to allow compensation to the said trustees for certain strips or parcels of land situated within the boundaries of certain streets, 61st, 62nd, and 63rd Streets, from the westerly side of First Avenue to New York Bay, laid out on the land map of the city of New York, though not yet opened, upon the ground that said lands were not the property of the said trustees, but had
484 been previously conveyed and delivered by the said trustees or their predecessors to the city of New York in trust for street purposes; that the amount of land in such proposed streets, for which said board of appraisers so refused to allow compensation, was eighty-one thousand one hundred and twenty (81,120) sq. ft.

"9. That the sum of one million seven hundred ninety-six thousand five hundred twenty-two and 20/100 ($1,796,522.20) dollars is not just compensation to the owner of said property so requisitioned as aforesaid.

"12. At the time of the taking and appropriation of said property on April 6th, 1918, and May 31st, 1918, by the United States of America, the fair and reasonable market value thereof was the sum of three million four hundred and twenty-eight thousand six hundred and forty-four dollars ($3,428,644).

"13. That just compensation herein for the taking and appropriation of said property hereinbefore described by the United States of America for public use is the sum of three million four hundred twenty-eight thousand six hundred and forty-four dollars ($3,428,644), with interest thereon at the rate of six per cent (6%) per annum from the date of appropriation and dispossession of the owner therefrom.

"17. That the fair and reasonable market value of the said
485 property requisitioned by the United States of America for public purposes at the time of such requisitions was three million four hundred and twenty-eight thousand six hundred and forty-four dollars ($3,428,644) whether or not the city of New York held title to the lands within the proposed limits of 61st, 62nd, and 63rd Streets if projected from the westerly line of First Avenue to New York Bay, in trust for street purposes.

"19. That the amount to be added to the said seventy-five per cent (75%) of said award, viz: One million three hundred forty-seven thousand three hundred and ninety-six dollars and 65/100 ($1,347,-396.65) to make up an amount as will be just compensation for such property so requisitioned by the United States of America is the sum of two million eighty-one thousand two hundred forty-seven dollars and thirty-five cents ($2,081,247.35), with interest thereon at the rate of six per cent (6%) per annum on one million eight hundred seventy-eight thousand one hundred and fifty dollars and ninety-two cents ($1,878,150.92) from April 6th, 1918, amounting at the date hereof to three hundred and nine thousand five hundred and eighty-one dollars and 88/100 ($309,581.88); and on two hundred and three thousand and ninety-six dollars and forty-three cents ($203,-096.43) from May 1st, 1918, amounting at the date hereof to thirty-one thousand six hundred and fifteen dollars and thirty-four cents ($31,615.34).

486 "20. That in addition the amount to be added to the said seventy-five per cent (75%) of said award to make up an amount which will be just compensation for such property is the sum of one per cent per annum on seventy-five per cent (75%) of said award, to wit: One million three hundred and forty-seven thousand three hundred and ninety-six dollars and sixty-five cents ($1,347,-396.65) from April 6th, 1918, to July 11th, 1919, amounting to seventeen thousand twenty-nine dollars and sixty cents ($17,029.60).

"21. That the total amount to be added to the said seventy-five per cent of said award to make up an amount which will be just compensation for such property so taken and appropriated for public use by the United States of America is the sum of two million four hundred thirty-nine thousand four hundred seventy-four and seventeen one-hundredths dollars ($2,439,474.17).

"23. That the city of New York had no right, title, or interest in and to any of the hereinbefore described property at the time of the appropriation thereof."

Twelfth. The trial court erred in allowing so much of the sixteenth finding of fact as sets out that the property within the limits of 61st, 62nd, and 63rd Streets from the westerly line of First Avenue to New York Bay remains in the possession of the grantors.

Thirteenth. The trial court erred in allowing so much of the first conclusion of law which sets out that the trustees of the
487 estate of William C. Langley were seized of parcel 2 at the time of the appropriation thereof by the United States.

Fourteenth. The trial court erred in allowing the following conclusions of law:

"4. That the fair and reasonable market value of the property of the plantiff hereinbefore described at the time of the appropriation was three million four hundred twenty-eight thousand six hundred and forty-four dollars ($3,428,644).

"5. That the amount to be added to said sum of seventy-five per cent of the award herein, to make just compensation by the United States of America for the property hereinbefore described is two million eighty-one thousand two hundred forty-seven and 35/100 dollars ($2,081,247.35), with interest thereon at the rate of six per cent per annum on one million eight hundred and seventy-eight thousand one hundred and fifty dollars and ninety-two cents ($1,878,150.92) from April 6th, 1918, amounting at the date hereof to three hundred and nine thousand five hundred eighty-one dollars and eighty-eight cents ($309,581.88); and on two hundred and three thousand and ninety-six dollars and forty-three cents (203,096.43) from May 31st, 1918, amounting at the date hereof to thirty-one thousand six hundred and fifteen dollars and thirty-four cents ($31,615.34); and the sum of seventeen thousand and twenty-nine dollars and sixty cents ($17,029.60), totalling two million
488 four hundred and thirty-nine thousand four hundred and seventy-four dollars and seventeen cents ($2,439,474.17).

"7. That the city of New York had no right, title or interest in the hereinbefore described property, or any part thereof, at the time of the taking thereof.

"8. That the plaintiff should have judgment against the United States of America for two million four hundred and thirty-nine thousand four hundred and seventy-four dollars and seventeen cents ($2,439,474.17), together with the costs and disbursements incurred in this action."

Fifteenth: The trial court erred in refusing to find as set out in the defendant's following proposed findings of fact:

"2. That the Board of Appraisers rightfully excluded from the award to the plaintiff herein the land lying in the beds of 61st, 62nd and 63rd Streets, from 1st Avenue to the high-water mark.

"3. That the sum of $1,796,522.20 was the fair and reasonable market value of the real estate belonging to the Langley Estate on the date of the appropriation.

"4. That the said sum of $1,796,522.20 was just compensation to the owner for the said property, which said property was taken for public purposes.

"5. That the Board of Appraisers in making the award of $1,976,522.20 allowed just compensation for the property taken for public purposes.

489 "6. That the trustees of the Langley Estate, as a consideration for the deed to the city of New York of the property comprised within the limits of 61st, 62nd, and 63rd Sts., received as consideration a release from prospective assessments for the open-

ing of the said streets of the land belonging to the estate within the area of assessment.

"7. That the plaintiff is not entitled to any interest on the money which he has accepted, to wit, the sum of $1,347,396.65.

"8. That the defendant is entitled to interest on the unpaid balance of $449,125.55 from the 6th day of April, 1918, to the 11th day of July, 1919.

"9. That the plaintiff is entitled to a judgment for the sum of $471,581.83."

Sixteenth. The trial court erred in refusing to find as set out in the following defendant's proposed conclusions of law:

"1. The plaintiff is entitled to judgment for the sum of $471,581.83.

"2. That the fair and reasonable market value of the property of the plaintiff on the date of appropriation was $1,796,522.20.

"3. That the city of New York has the title to the property within the bed of 61st, 62nd and 63rd Streets from First Avenue to the pierhead line.

"4. That the plaintiff should have judgment against the United States for the sum of $471,581.83."

490 Seventeenth. The trial court erred in refusing to find as set out in the following findings of fact as submitted by the defendant the city of New York and joined in by this defendant:

"5. That 61st Street from the westerly side of First Avenue to the New York Bay comprises all the land within the lines of said street in an entire block in extent.

"6. That 62nd Street from the westerly side of First Avenue to the New York Bay comprises all the land within the lines of said street in an entire block in extent.

"7. That 63rd Street from the westerly side of First Avenue to the New York Bay comprises all the land within the lines of said street in an entire block in extent.

"10. That on April 25, 1899, the said trustees duly executed and delivered to John Whalen, the then corporation counsel of the city of New York, a deed granting and conveying to the city of New York, the fee impressed with a trust for street purposes, of the lands included within the limits of 61st Street, 62nd Street and 63rd Street, from the westerly side of First Avenue to

"18. That said trustees made an affidavit on April 25, 1899, that they as trustees were on said date the owners of 61st Street, 62nd Street and 63rd Street, from the westerly side of First Avenue to the aforesaid pierhead line and that said lands were on said date free and clear of all encumbrances.

491 "19. That by certificate dated May 2, 1899, the Title Guarantee and Trust Company certified that title to the lands lying within the limits of said streets, from the westerly side of First Avenue to the aforesaid pierhead line, could be conveyed by said trustees free and clear of all encumbrances and that said trustees had full right to convey the same.

"20. That on April 25, 1899, the said trustees duly executed and delivered to John Whalen, the then corporation counsel of the city of New York, a deed granting an conveying to the city of New York, the fee, impressed with a trust for street purposes, of the lands included within the limits of 61st Street, 62nd Street, and 63rd Street, from the westerly side of First Avenue to the aforesaid pierhead line."

Eighteenth. The trial court erred in refusing to find as set out in the following proposed conclusions of law as submitted by the defendant The City of New York and joined in by this defendant:

"1. That the defendant The City of New York, by virtue of the deed mentioned in Finding of Fact X, was on April 25, 1899, and ever since has been vested with the fee, impressed with a trust for street purposes, of the lands included within the limits of 61st Street, 62nd Street, and 63rd Street from the westerly side of First Avenue to the New York Bay.

"2. That the defendant The City of New York is entitled to judgment dismissing the complaint, together with costs.

492 "1-A. That the defendant The City of New York, by virtue of the deed mentioned in Findings of Fact X and XX, was on April 25, 1899, and ever since has been vested with the fee, impressed with a trust for street purposes, of the lands included within the limits of 61st Street, 62nd Street, and 63rd Street, from the westerly side of First Avenue to the pierhead line established by chapter 491 of the Laws of the State of New York of 1884 and approved by the Secretary of War on March 4, 1890."

LEROY W. ROSS,
*United States Attorney, Eastern District of New York,*
*Attorney for Defendant United States of America.*

493 *Petition for writ of error by the city of New York.*

United States District Court for the Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA AND THE CITY OF NEW York, defendants.

*To the Honorable Judges of the District Court of the United States for the Eastern District of New York:*

And now comes the defendant The City of New York, petitioner herein, and says that on or about January 5, 1921, this court entered judgment herein in favor of George F. Benedict, as sole surviving trustee of the trusts created by the last will and testament of William C. Langley, deceased, and against United States of America, in which judgment and proceedings had prior thereunto in this action,

certain errors were committed to the prejudice of this petitioner, of all of which more in detail appear from the assignment of errors which is filed with this petition.

494 Wherefore, this petitioner prays that a writ of error be issued, directed to the honorable the judges of the District Court of the United States for the Eastern District of New York, commanding that under their seal they send the record and proceedings in this action with all things concerning the same to the judges of the United States Circuit Court of Appeals for the Second Circuit, together with this writ so that the records and proceedings being inspected, the said judges of the United States Circuit Court for the Second Circuit may cause further to be done therein to correct such errors what of right and according to the law and custom of the United States ought to be done.

Dated, New York, April 1, 1921.

JOHN F. O'BRIEN,
*Assistant Corporation Counsel of The City of New York, Attorney for Petitioner, Municipal Building, Borough of Manhattan, New York City.*

495 *Assignment of errors by the city of New York.*

United States District Court for the Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF THE trusts created by the last will and testament of William C. Langley, deceased, plaintiff,

*against*

UNITED STATES OF AMERICA AND THE CITY OF NEW YORK, defendants.

And now comes the defendant, The City of New York, which is one of the plaintiffs in error, by John F. O'Brien, its attorney, and says that the court erred upon the trial of this action in the following respects, namely:

First. In denying the motion made by the defendant The City of New York counsel to dismiss the complaint as to the defendant The City of New York, for the reason that said defendant was the owner on April 25, 1899, and ever since has been and is now vested with the fee, impressed with a trust for street purposes, of the lands included within the limits of 61st Street, 62nd Street, and 63rd Street, from the westerly side of First Avenue to the pierhead

496 line established by chapter 491 of the laws of the State of New York of 1884 and approved by the Secretary of War on March 4, 1890.

Second. In holding that the deed dated April 25, 1899, executed and delivered by William H. Langley and Charles C. Goodrich, as

trustee of and under the last will and testament of William C. Langley, deceased, to The City of New York conveying to said city the aforesaid streets besides other streets, is void because the said trustees received no definite consideration for said deed.

Third. In holding that the defendant The City of New York had no right, title, and interest in the premises described in paragraph "First" herein on the days said premises were requisitioned, commandeered and taken by the United States of America for an Army supply base and expeditionary depot, to provide facilities for the storage of supplies connected with the common defense.

Fourth. In finding that for many years prior to April 6th, 1918, and on said date said William H. Langley and George F. Benedict, as trustees as aforesaid, were the owners in fee and were duly seized and possessed of the following described property, situate, lying and being the Borough of Brooklyn, city of New York and State of New York, and situated within the jurisdiction of the United States District Court for the Eastern District of New York; so devised in trust by William G. Langley, as hereinbefore set forth:

"All those certain lots, pieces or parcels of land, situate, lying and being in the Borough of Brooklyn, county of Kings, State
497 and city of New York, more particularly described as follows:

"Parcel No. 1.

"Beginning at the point of intersection of the westerly line of First Avenue and the centre line of Fifty-eighth Street; running thence westerly along the centre line of 58th Street and its prolongation eighteen hundred and twelve feet (1,812) and seven inches (7), more or less, to the pierhead line established by chapter 491 of the laws of the State off New York of 1884 and approved by the Secretary of War on March 4th, 1890; thence southerly along said pierhead line two hundred and sixty feet (260) and four inches (4) to a point opposite the prolongation of the centre line of 59th Street; thence easterly along the centre line of Fifty-ninth Street and its prolongation eighteen hundred and nineteen feet and seven inches (7), more or less, to the westerly line of First Avenue, and thence northerly along the westerly line of First Avenue two hundred and sixty feet (260) and four inches (4), more or less, to a point or place of beginning, containing approximately four hundred and seventy-two thousand seven hundred and eighty and one-tenth (472,780.1) square feet.

"Parcel No. 2.

"All that certain lot, piece, or parcel of land beginning at the point of intersection of the westerly line of First Avenue and the
498 southerly line of Sixty-third Street and its prolongation; running thence northerly along the westerly line of First Avenue six hundred and sixty-eight (668) feet and one (1) inch to a point one hundred and eighteen feet and one inch northerly from the cen-

tre line of Sixty-third Street; running thence westerly at right angles to the westerly line of First Avenue eighteen hundred and thirty-four (1,834) feet and five and one-half inches (5½), more or less, to the pierhead line above described; thence southerly along said pierhead line approximately six hundred and sixty-eight (668) feet to a point on said pierhead line formed by the intersection therewith of the southerly line of 63d Street prolonged; thence easterly along the southerly line of 63d Street prolonged eighteen hundred and eighty (1,882) feet three and three-eighths inches (3⅜), more or less, to the point of beginning, containing approximately one million two hundred and forty-one thousand five hundred and forty-one and nine-tenths (1,241,541.9) square feet."

Fifth. In finding that the Board of Appraisers in making said award unjustly and wrongfully refused to allow compensation to the said trustees for certain strips or parcels of land situated within the boundaries of certain streets—61st, 62d, and 63d Street—from the westerly side of First Avenue to New York Bay, laid out on the land map of the city of New York, though not yet opened, upon the ground that said lands were not the property of the said trustees, but had been previously conveyed and delivered by the said trustees
499 or their predecessors to the city of New York in trust for street purposes; that the amount of land in such proposed streets, for which said Board of Appraisers so refused to allow compensation, was eighty-one thousand one hundred and twenty (81,120) square feet.

Sixth. In finding that the city of New York had no right, title, or interest in and to any of the hereinbefore described property at the time of the appropriation thereof.

Seventh. In concluding that at the time of appropriation thereof by the United States of America, William H. Langley and George F. Benedict, as trustees of the trust created by the last will and testament of William C. Langley, deceased, were the owners in fee and duly seized and possessed of the following-described property, situate, lying, and being in the Borough of Brooklyn, city of New York and State of New York, and situated within the jurisdiction of the United States District Court for the Eastern District of New York, described as follows:

"All those certain lots, pieces or parcels of land situate, lying, and being in the Borough of Brooklyn, County of Kings, State and city of New York, more particularly described as follows:

"Parcel No. 1.

"Beginning at the point of intersection of the westerly line of First Avenue and the centre line of Fifty-eighth Street; running thence westerly along the centre line of 58th Street and its prolongation eighteen hundred and twelve (1,812) feet and seven
500 inches (7), more or less, to the pierhead line established by chapter 491 of the laws of the State of New York of 1884 and

approved by the Secretary of War on March 4th, 1890; thence southerly along said pierhead line two hundred and sixty feet (260) and four inches (4) to a point opposite the prolongation of the centre line of 59th Street; thence easterly along the centre line of Fifty-ninth Street and its prolongation eighteen hundred and nineteen feet and seven inches (7), more or less, to the westerly line of First Avenue, and thence northerly along the westerly line of First Avenue two hundred and sixty feet (260) and four inches (4), more or less, to the point or place of beginning, containing approximately four hundred and seventy-two thousand seven hundred and eighty and one-tenth (472,780.1) square feet.

"Parcel No. 2.

"All that certain lot, piece, or parcel of land beginning at the point of intersection of the westerly line of First Avenue and the southerly line of Sixty-third Street and its prolongation; running thence northerly along the westerly line of First Avenue six hundred and eighty-eight (668) feet and one (1) inch to a point one hundred and eighteen feet and one inch northerly from the centre line of Sixty-first Street; running thence westerly at right angles to the westerly line of First Avenue eighteen hundred and thirty-four (1,834)
501 feet and five and one-half inches (5½), more or less, to the pierhead line above described; thence southerly along said pierhead line approximately six hundred and sixty-eight (668) feet to a point on said pierhead line formed by the intersection therewith of the southerly line of 63d Street prolonged; thence easterly along the southerly line of 63d Street prolonged eighteen hundred and eighty-two feet (1,882) three and three-eighths inches (3⅜), more or less, to the point of beginning, containing approximately one million two hundred and forty-one thousand five hundred forty-one and nine-tenths (1,241,541.9) square feet."

Eighth. In concluding that the conveyance by the trustees to the city of New York on April 25, 1899, hereinbefore referred to, was not such a sale as the trustees had power to make under the will of William C. Langley, hereinbefore referred to, and was void.

Ninth. In concluding that the city of New York had no right, title, or interest in the hereinbefore decribed property or any part thereof at the time of the taking thereof.

Tenth. In refusing to find that 61st Street from the westerly side of First Avenue to the New York Bay, comprised on and prior to April 25, 1899, and ever since, has comprised all the land within the lines of said street in an entire block in extent.

Eleventh. In refusing to find that 62d Street from the westerly side of First Avenue to the New York Bay comprised on and
502 prior to April 25, 1899, and ever since has comprised all the land within the lines of said street in an entire block in extent.

Twelfth. In refusing to find that 63d Street from the westerly side of First Avenue to the New York Bay, comprised on and prior to April 25, 1899, and ever since, has comprised all the land within the lines of said street in an entire block in extent.

Thirteenth. In refusing to find that on April 25, 1899, the said trustees duly executed and delivered to John Whalen, the then corporation counsel of the city of New York, a deed granting and conveying to the city of New York the fee, impressed with a trust for street purposes, of the lands included within the limits of 61st Street, 62d Street, and 63d Street from the westerly side of First Avenue to the New York Bay.

Fourteenth. In refusing to find that said trustees made an affidavit on April 25, 1899, that they as trustees were on said date the owners of 61st Street, 62d Street, and 63d Street from the westerly side of First Avenue to the aforesaid pierhead line, and that said lands were on said date free and clear of all encumbrances.

Fifteenth. In refusing to find that by certificate dated May 2, 1899, the Title Guarantee and Trust Company certified that title to the lands lying within the limits of said streets from the westerly side of First Avenue to the aforesaid pierhead line could be conveyed by said trustees free and clear of all encumbrances, and that said trustees had full right to convey the same.

503 Sixteenth. In refusing to find that on April 25, 1899, the said trustees duly executed and delivered to John Whalen, the then corporation counsel of the city of New York, a deed granting and conveying to the city of New York the fee, impressed with a trust for street purposes of the lands included within the limits of 61st Street, 62d Street, and 63d Street, from the westerly side of First Avenue to the aforesaid pierhead line.

Seventeenth. In refusing to conclude that the defendant The City of New York, by virtue of the deed dated April 25, 1899, executed by and between William H. Langley and Charles C. Goodrich as trustees of and under the last will and testament of William C. Langley, deceased, and the city of New York, was on April 25, 1899, and ever since has been vested with the fee, impressed with a trust for street purposes of the lands included within the limits of 61st Street, 62d Street, and 63d Street, from the westerly side of First Avenue to the New York Bay.

Eighteenth. In refusing to conclude that the defendant The City of New York, by virtue of the deed dated April 25, 1899, executed by and between William H. Langley and Charles C. Goodrich as trustees of and under the last will and testament of William C. Langley, deceased, and the city of New York, was on April 25, 1899, and ever since has been vested with the fee, impressed with a trust for street purposes of the lands included within the limits of 61st Street, 62d Street, and 63d Street, from the westerly side of

504 First Avenue to the pierhead line, established by chapter 491 of the Laws of the State of New York of 1884, and approved by the Secretary of War on March 4, 1890.

Nineteenth. In refusing to conclude that the defendant The City of New York is entitled to judgment dismissing the complaint, together with costs.

JOHN F. O'BRIEN,
*Assistant Corporation Counsel, Attorney for Plaintiff in Error, The City of New York, Office and Post Office Address, Municipal Building, Borough of Manhattan, New York City.*

Read on application for writ of error, April 1, 1921.

EDWIN L. GARVIN,
*United States District Judge.*

505 *Citation on writ of error by the United States of America.*

THE PRESIDENT OF THE UNITED STATES OF AMERICA, *ss:*

*To George F. Benedict, as sole surviving trustee of the trusts created by the last will and testament of William C. Langley, deceased, greeting:*

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit, to be held in the United States courthouse in the Borough of Manhattan, city of New York, on the 30th day of April, 1921, pursuant to a writ of error allowed and filed in the clerk's office of the District Court of the United States for the Eastern District of New York, wherein the United States of America is one of the plaintiffs in error and you are the defendant in error, to show cause, if any there be, why the judgment and the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edwin L. Garvin, one of the judges of the District Court of the United States, holding court in the Eastern District of New York, this 1st day of April, one thousand nine hundred and twenty-one and of the Independence of the United States the one hundred and forty-fifth.

EDWIN L. GARVIN,
*Judge of the United States District Court for the Eastern District of New York.*

506 *Citation on writ of error by the city of New York.*

UNITED STATES OF AMERICA, *ss:*

*To George F. Benedict, as sole surviving trustee of the trusts created by the last will and testament of William C. Langley, deceased, greeting:*

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit, to be held at the United States courthouse in the Borough of Manhattan,

in the city and State of New York, in said circuit, on the 30th day of April, 1921, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of New York, wherein The City of New York is one of the plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against United States of America, one of said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edwin L. Garvin, one of the judges of the District Court of the United States holding court in the eastern district of New York, in the second circuit, this 1st day of April, in the year of our Lord one thousand nine hundred and twenty-one.

EDWIN L. GARVIN,
*Judge of the United States District Court for the Eastern District of New York in the Second Circuit.*

507 *Stipulation waiving printing of exhibits.*

United States District Court for the Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF THE trusts created by the last will and testament of William C. Langley, deceased (plaintiff below), defendant in error,

*against*

UNITED STATES OF AMERICA AND THE CITY OF NEW York (defendants below), plaintiffs in error.

It is hereby stipulated by and between the attorneys for the respective parties hereto that the exhibits herein, with the exception of Exhibits B and W of the plaintiff and Exhibit 1 of the United States of America, shall not be printed in the papers upon review of the judgment herein in the Circuit Court of Appeals, but that the same may be produced upon the argument of said cause and submitted to the Circuit Court of Appeals at the option of any of the parties hereto.

Dated, June 13, 1921.

LEROY W. ROSS,
*United States Attorney.*
JOHN F. O'BRIEN,
*Asst. Corporation Counsel.*
SEIBERT & RIGGS,
*Attorneys for Defendant in Error.*

508 *Plaintiff's Exhibit "B."*

United States District Court for the Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF THE trusts created by the last will and testament of William C. Langley, deceased, plaintiff,

*against*

UNITED STATES OF AMERICA AND THE CITY OF NEW YORK, defendants.

Whereas a map made by the General Contracting & Engineering Company of 29 Broadway, New York City, dated May 10th, 1911, was duly proved by the Langley Estate in a proceeding entitled "In the matter of the application of the city of New York acting by and through the commissioner of docks relative to acquiring right and title to possession of certain uplands, etc., between the center line of 62nd Street prolonged, the center line of 61st Street prolonged, the westerly line of Second Avenue, and the pierhead line approved by the Secretary of War in 1890, South Brooklyn, etc.," by the testimony of William T. Markham, the maker of such map, such testimony being set forth on pages 322, et sequitur, of such proceedings, and

Whereas said map was introduced in evidence before the Board of Appraisers of the War Department appointed pursuant to the
509 authority of section 10 of the food and fuel act of August 10th, 1917, and was used as the basis of testimony as to value of property of the Langley Estate, and

Whereas the award of said appraisers was based upon said map and the United States Government accepted a deed of such property based thereon; and

Whereas the maker thereof, William T. Markham, died at Ossining, New York, in March, 1920.

Now therefore it is stipulated and agreed that the map of the General Contracting & Engineering Company, dated May 10th, 1911, showing the boundaries and square feet area of the property claimed by the Langley Estate in this proceeding may be introduced in evidence without further proof by the plaintiff, and that the testimony of the said William T. Markham, hereinbefore referred to, as to the making of said map may be read in evidence by either side with the same force and effect as if the witness were called personally in the trial of the above-entitled cause and gave such testimony therein.

GANNON, SEIBERT & RIGGS,
*Attorneys for Plaintiff.*

LEROY W. ROSS,
*United States District Attorney.*

U. S. District Court, E. D. of New York. Benedict *vs.* United States. Plaintiff's Exhibit B. Dated May 10, 1921. Clerk, J. S.

510 *Plaintiff's exhibit "W."*

United States District Court for the Eastern District of New York.

GEORGE F. BENEDICT AS SOLE SURVIVING TRUSTEE OF THE trusts created by the last will and testament of William C. Langley, deceased, plaintiff,

*against*

UNITED STATES OF AMERICA AND THE CITY OF NEW York, defendants.

It is stipulated by and between the attorneys for the plaintiff and the United States district attorney for the United States of America that upon the trial of this action the United States will admit the allegations set forth in Paragraphs III and IV of the amended complaint herein, excepting and reserving from such admission, however, the title to the real property comprised in the beds of 61st, 62nd, and 63rd Streets, Borough of Brooklyn, city of New York, extending from the westerly side of First Avenue to high-water mark, the title to which said property is claimed by the United States of America to be in the city of New York.

April 28, 1920.

GANNON, SEIBERT & RIGGS,
*Attorneys for Plaintiff.*
LEROY W. ROSS,
*United States District Attorney.*

511 *Defendant United States of America's Exhibit 1.*

United States District Court Eastern District of New York.

GEORGE F. BENEDICT, AS TRUSTEE, ETC., PLAINTIFF,
*against*
UNITED STATES OF AMERICA AND THE CITY OF NEW York, defendants.

Whereas, the Board of Appraisers appointed by the War Department, as referred to in the complaint in the above-entitled action, set forth in their report that they had had a survey made by Major Perrine, Constructing Quartermaster at the Army Base in South Brooklyn, of the area of lands comprised in the beds of 61st, 62nd, and 63rd Streets, between the westerly side of First Avenue and the existing high-water mark at the time of the taking by the United States of America, in April, 1918, and said Major Perrine reported in said survey that such area was 81,120 square feet, consisting of 18,240 in 61st Street; 21,300 square feet in 62nd Street, and 41,580 square feet in 63rd Street.

It is hereby stipulated and agreed by and between the attor-
512 neys for the respective parties hereto that the figures herein-
before set forth of such survey of Major Perrine are accepted and may be used on the trial of this action as being correct figures of the area of the respective streets within said lines as of the time of the taking, to wit, April, 1918.

GANNON, SEIBERT & RIGGS,
*Attorneys for Plaintiff.*
LEROY W. ROSS,
*United States District Attorney, E. D. N. Y.*
JOHN P. O'BRIEN,
*Corporation Counsel.*

513 *Stipulation.*

It is hereby stipulated that the foregoing is a true and correct transcript of the record in the above-entitled suit as agreed on by the parties, and may be certified as such by the clerk of this court.
Dated, June 30, 1921.

GANNON, SEIBERT & RIGGS,
*Attorneys for Plaintiff.*
LEROY W. ROSS,
*Attorney for Defendant United States of America.*
JOHN F. O'BRIEN,
*Attorney for Defendant The City of New York.*

*Clerk's certificate.*

I, Percy G. B. Gilkes, clerk of the District Court of the United States for the Eastern District of New York, do hereby certify that the foregoing is a true transcript of the record of said district court in the above-entitled suit as agreed on by the parties.
In testimony whereof I have caused the seal of said court to be hereto affixed at the city of New York, in the Eastern District of New York, this 30 day of June, in the year of our Lord one thousand nine hundred and twenty-one, and of the Independence of the United States the one hundred and forty-fifth.
[SEAL.] (Signed) PERCY G. B. GILKES,
*Clerk.*

514 United States Circuit Court of Appeals for the Second District.

GEORGE P. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trust created by the last will and testament of William C. Langley, deceased, plaintiff (defendant in error and appellee),
*against*
UNITED STATES OF AMERICA AND CITY OF NEW YORK, defendants (plaintiffs in error and appellants).

SIRS: Please take notice that upon the annexed affidavit of George F. Benedict, verified April 8th, 1921, and the former proceedings

herein, that the plaintiff herein will move the United States Circuit Court of Appeals for the Second District, at a term thereof to be held in the post office building, borough of Manhattan, city of New York on the 18th day of April, 1921 at 10.30 a. m., or as soon thereafter as counsel can be heard, for an order dismissing the writ of error and the appeal allowed herein on April 1st, 1921, upon the ground that the United States Circuit Court of Appeals for the Second District has no jurisdiction therein, and for such other and further relief as to the court may seem proper.

Dated, April 8, 1921.

GANNON, SEIBERT & RIGGS,
*Attorneys for Plaintiff (Defendant in Error and Appellee),*
*Office and P. O. Address, 2 Rector Street, Borough of Manhattan, City of New York.*

515 To Hon. LEROY W. ROSS,
*United States Attorney,*
*Office and P. O. Address, Post Office Building,*
*Borough of Brooklyn, City of New York,*
and
Hon. JOHN P. O'BRIEN,
*Corporation Counsel,*
*Office and P. O. Address, Municipal Building,*
*Borough of Manhattan, City of New York.*

516 United States Circuit Court of Appeals for the Second District.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF THE trust created by the last will and testament of William C. Langley, deceased, plaintiff, defendant in error and appellee,

*against*

UNITED STATES OF AMERICA AND CITY OF NEW YORK, defendants, plaintiffs in error and appellants,

STATE OF NEW YORK,
*County of New York, ss:*

GEORGE F. BENEDICT, being duly sworn, deposes and says:

1. I am the duly qualified and sole surviving trustee of the trust created by the last will and testament of William C. Langley, deceased, and I am the plaintiff herein.

2. This action was instituted on September 17, 1919, by the service of a summons and complaint in the United States District Court for the Eastern District of New York, upon the United States attorney for said district, and by service by registered mail thereof upon the Attorney General of the United States at Washington, D. C. That thereafter the United States of America duly appeared herein by Honorable Leroy W. Ross, United States attorney. The city of New York was made a party hereto, as hereinafter set forth, and the

amended summons and complaint served upon the city of New York. That the city of New York duly appeared herein by Honorable John P. O'Brien, corporation counsel. That this cause was dock-
517 eted by the clerk of the United States District Court in the law docket, and duly appeared upon the law calendar of said court for trial. That said cause was tried before United States District Judge Edwin L. Garvin, a stipulation waiving a jury trial having been duly signed and filed in the office of the clerk by all the parties to this action prior to said trial. That thereafter Judge Garvin made findings of fact and conclusions of law, and on January 5th, 1921, the judgment was entered against the United States of America for the sum of $2,439,495.41.

3. That this action was brought to recover just compensation for the requisitioning of real property by the United States of America, pursuant to section 10 of the act of August 10th, 1917, 40 Statutes at Large, page 276, as follows:

"SECTION 10. That the President is authorized from time to time to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amount as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies;" etc.

4. That attached hereto and made a part hereof are copies of the findings of fact and conclusions of law of the District Court of the United States for the Eastern District of New York, dated January 5th, 1921, and a copy of the judgment of the District Court of the United States for the Eastern District of New York, dated January 5th, 1921.

518 5. That on April 1st, 1921, the United States of America presented to Honorable Edwin L. Garvin, United States district judge, a writ of error herein to the United States Circuit Court of Appeals for the Second District, which was allowed by said judge on said date. On the same date the United States of America presented to the said judge an appeal to the said court, which was allowed on the same date; that on the same date the United States of America presented to the said judge a writ of error to the Supreme Court of the United States, which was allowed by said judge on said date; and also an appeal to the Supreme Court of the United States, which was allowed by the said judge on said date.

That on said date, April 1st, 1921, the city of New York presented to the Honorable Edwin L. Garvin, United States district judge, a

writ of error to this court, and also to the Supreme Court of the United States; and an appeal to this court, and also to the Supreme Court of the United States.

6. That deponent herein is advised by his counsel and verily believes that only one of the aforesaid four methods of review sought by the defendants in this case can be the proper method of review, and that this court is without jurisdiction herein, and that the proper method of review of the judgment by which the defendants are agreed, if any, is by writ of error to the Supreme Court of the United States.

7. The city of New York was made a party to this action, and its interest therein is as follows:

The Board of Appraisers appointed by the President to
519 determine just compensation to the plaintiff for the requisitioning of the real property described in the complaint, had refused to allow any such compensation to the plaintiff of 81,120 square feet of real property within the limits of 61st, 62nd, and 63rd Streets, Borough of Brooklyn, City of New York, between First Avenue and high-water line requisitioned by the United States of America, upon the ground that such property had been previously conveyed by the predecessors of the plaintiff to the city of New York in trust for street purposes, and that the plaintiff was not the owner thereof at the time of the said requisitioning. (Finding of fact #8.)

8. Plaintiff claimed title to such property at the time of the requisitioning, and that the said alleged deed referred to was wholly void.

9. After service of the original complaint herein the United States attorney notified my attorneys that he desired that the city of New York be made a party hereto; so that the city of New York would be bound by the judgment herein; and that he proposed to move for an order making the city of New York a party hereto; thereafter, upon consent of the parties and upon motion of the United States attorney, an order was made, dated October 31st, 1919—

"That the city of New York be brought in as a party defendant in the above-entitled action, and that the clerk of this court issue a supplementary summons directed to the city of New York; that the plaintiff is permitted to make and file within ten days a supplementary complaint including the city of New York as a party defendant herein without prejudice to proceedings heretofore had."

10. That thereafter a supplementary and amended complaint was served upon the city of New York and upon the United States of America, being amended from the original complaint only in the respect that it alleged that the city of New York claimed an
520 interest, either substantial or nominal, in the property referred to, adverse to that of the plaintiff, and that no personal claim was made against the city of New York. No relief against the city of New York was demanded in the complaint.

11. Thereafter the city of New York answered, putting at issue the title to the streets hereinbefore set forth, and praying that the

complaint be dismissed. No affirmative relief was asked by the city of New York, and it was conceded upon the record at the trial by corporation counsel that no affirmative relief could be obtained in this action by the city of New York.

12. The court below held that the alleged conveyance referred to was void, and that the city of New York had no right, title, or interest therein; that the market value of the property at the time of the requisitioning was $3,428,644, whether or not the city of New York held title to the property at 61st, 62nd, and 63rd Street in trust for street purposes. (Findings of fact, 15, 16, and 17.)

Wherefore plaintiff prays that the writs of error allowed to the defendants, United States of America and City of New York on April 1st, 1921, and the appeals allowed on said date to the said defendants be dismissed for the reasons aforesaid, with such further and other relief as to the court may seem proper.

GEORGE F. BENEDICT.

Sworn to before me this 8th day of April, 1921.

WILLIAM L. O'CONOR,
*Notary Public, Queens County; Queens County Clerk's No. 1125; Certificate filed in New York County; Clerk's No. 142; Register's No. 2122.*

Commission expires March 30, 1922.

521 United States District Court for the Eastern District of New York.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF THE trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA AND THE CITY OF NEW YORK, defendants.
} L-932.

The issues of fact in the above-entitled action having regularly come on for trial before the undersigned at a term of this court held in the post-office building, Borough of Brooklyn, city of New York, on the 11th, 12th, and 13th days of May, 1920, and the parties having stipulated in writing that a jury herein be waived, which stipulation is filed with the clerk of this court, and the plaintiff having appeared herein by Gannon, Seibert & Riggs, Esq., his attorneys (William H. Seibert and Royal E. T. Riggs of counsel), and the United States of America by Leroy W. Ross, United States attorney (Charles J. Buchner of counsel), and the city of New York by John P. O'Brien, corporation counsel (E. J. Kenny of counsel), and the allegations and proofs of the parties having been heard, I do hereby find as follows:

1. That the United States of America is a sovereign power created by the Constitution of the United States, with its principal offices in the city of Washington, District of Columbia.

522 2. That William C. Langley, late of the county of Kings, died on or about the 1st day of December, 1890, seized in fee simple absolute of two certain pieces or parcels of land hereinafter described, located in the Borough of Brooklyn, county of Kings, city and State of New York, and within the territorial jurisdiction of the United States Court for the Eastern District of New York; that said William C. Langley left a last will and testament, dated February 8th, 1890, which said last will and testament was duly admitted to probate by the surrogates' court of the county of Kings, State of New York, wherein and whereby said William C. Langley devised and bequeathed said premises hereinafter described, together with other property, to certain trustees therein named, to wit, William H. Langley and Charles C. Goodrich, in trust for the uses and purposes and with the powers therein set forth.

3. That said William H. Langley and Charles C. Goodrich accepted such trusts and duly qualified as such trustees under said last Will and Testament and respectively entered upon the duties thereof; that thereafter said Charles C. Goodrich resigned and William F. Dunning was duly appointed as substituted trustee in his place under said Will, by order of the Surrogates' Court, County of Kings, State of New York, and said William F. Dunning accepted said trusts and duly qualified as such trustee and entered upon the duties thereof; that thereafter said William F. Dunning died April 1st, 1907, and George F. Benedict was duly appointed as substituted trustee in his place under said Will, by order of the Supreme Court, County of Kings, State of New York, dated September 6th, 1907, and said George F. Benedict accepted said trusts and duly qualified as such
523 trustee and entered upon the duties thereof; that thereafter and on or about June 22nd, 1919, said William H. Langley died and the said George F. Benedict is now and has been since said date the sole surviving trustee under the said last Will and Testament.

4. That for many years prior to April 6th, 1918, and on said date said William H. Langley and George F. Benedict, as Trustees as aforesaid, were the owners in fee and were duly seized and possessed of the following described property, situate, lying and being in the Borough of Brooklyn, City of New York, and State of New York, and situated within the jurisdiction of the United States District Court for the Eastern District of New York; so devised in trust by William C. Langley, as hereinbefore set forth:

"All those certain lots, pieces or parcels of land, situate, lying and being in the Borough of Brooklyn, County of Kings, State and City of New York, more particularly as follows:

"Parcel No. 1.

"Beginning at the point of intersection of the westerly line of First Avenue and the centre line of Fifty-eighth Street; running thence westerly along the centre line of 58th Street and its prolonga-

tion eighteen hundred and twelve feet (1812) and seven inches (7) more or less to the pierhead line established by Chapter 491 of the Laws of the State of New York of 1884 and approved by the Secretary of War on March 4th, 1890; thence southerly along said pierhead line two hundred and sixty feet (260) and four inches (4) to a point opposite the prolongation of the centre line of 59th Street; thence easterly along the centre line of Fifty-ninth Street and its prolongation eighteen hundred and nineteen feet and seven inches (7) more or less to the westerly line of First Avenue; and thence northerly along the westerly line of First Avenue two hundred and sixty feet (260) and four inches (4) more or less to the point or place of beginning, containing approximately four hundred and seventy-two thousand, seven hundred and eighty and one-tenth (472,780.1) square feet.

"Parcel No. 2.

"All that certain lot, piece or parcel of land beginning at
524 the point of intersection of the westerly line of First Avenue and the southerly line of Sixty-third Street and its prolongation; running thence northerly along the westerly line of First Avenue, six hundred and sixty-eight (668) feet and one (1) inch to a point one hundred and eighteen feet and one inch northerly from the centre line of Sixty-first Street; running thence westerly at right angles to the westerly line of First Avenue eighteen hundred and thirty-four (1834) feet and five and one-half inches (5½) more or less to the pierhead line above described; thence southerly along said pierhead line approximately six hundred and sixty-eight (668) feet to a point on said pierhead line formed by the intersection therewith of the southerly line of 63rd St. prolonged; thence easterly along the southerly line of 63rd St. prolonged eighteen hundred and eighty-two (1882) feet three and three-eighths inches (3⅜) more or less to the point of beginning, containing approximately one million, two hundred and forty-one thousand, five hundred forty-one-and nine-tenths (1,241,541.9) square feet."

5. That on or about April 6th, 1918, all the real property hereinbefore described, except those portions thereof lying in the beds of proposed 63rd Street and 58th Street, between 1st Avenue and the pierhead line as laid out on the land map of the city of New York, such streets not yet being opened, and all right, title, and interest of the said trustees therein and thereto was requisitioned, commandeered, and taken by the United States of America, acting through the President as its duly authorized agent, for an Army supply base and expeditionary depot, to provide facilities for the storage of supplies connected with the common defense; that the United States of America, in making said requisition, known as Army requisition No. 8 B/C, acted under authority of section 10 of the food & fuel act of August 10th, 1917 (40 Statutes 279), authorizing the President of the United States from time to time to requisition feeds, foods,

fuels, and other supplies necessary to the support of the Army or any other public use connected with the common defense, and
525 to requisition or otherwise provide storage facilities for such supplies, and to ascertain and pay a just compensation therefor; and on said 6th day of April, 1918, the United States of America took possession of said premises hereinbefore described, excepting such portions thereof as lay in the beds of 63rd and 58th Streets, as aforesaid, and excluded the said trustees from all right, title, and interest therein and from possession thereof, and the United States of America appropriated the said premises to its own use and has ever since retained possession of the same.

6. That thereafter and on or about May 31st, 1918, such portions of the hereinbefore described property as lay within the beds of proposed 63rd and 58th Streets, between 1st Avenue to the pierhead line, as laid out on the land map of the city of New York, such streets not yet being opened, being strips of land, respectively, approximately sixty and thirty feet wide and eighteen hundred and eighty-two feet and eighteen hundred and twelve feet and 7 inches long, and all right, title, and interest of the said trustees therein and thereto, were similarly requisitioned, commandeered, and taken by the United States of America, acting through the President thereof as its duly authorized agent, for similar purposes, by supplementary requisition No. 202 B/C, under similar authority, and on May 31st, 1918, the United States of America took possession of said premises and excluded the said trustees from all right, title, and interest therein and from possession thereof, and the United States of America appropriated the same to its own use and has ever since retained possession of the same.

526 7. That the President of the United States, acting pursuant to the provisions of section 10 of the act hereinbefore referred to, in and by the provisions of General Orders No. 30, duly promulgated by the War Department at Washington, District of Columbia, dated April 1st, 1918, duly constituted and composed in the said War Department a Board of Appraisers composed as therein set forth and charged with duties as therein described, among which duties were to determine by proper methods just compensation for all property requisitioned and commandeered or otherwise summarily taken over according to law for the direct and special use of the Army; that thereafter and from time to time the said trustees attended before the Board of Appraisers constituted and composed by General Orders No. 30 hereinbefore referred to, and presented a claim for just compensation for the property requisitioned and commandeered as hereinbefore described, and such proceedings were had by such board that on or about May 2nd, 1919, the said Board of Appraisers made an award, being award No. 830, for requisitions Nos. 8 B/C and 202 B/C, as hereinbefore set forth, finding that the said property hereinbefore described, in two parcels containing, respectively, 472,780.1 sq. ft. and 1,241,541.9 sq. ft., was taken for public use

by the United States of America on April 6th, 1918, and May 31st, 1918, respectively, and awarding to George F. Benedict and William H. Langley, as trustees as aforesaid, as just compensation for their interest in said property, including the value thereof and damages arising out of the taking thereof, and all charges accrued against or on account of said property prior to the taking thereof, the sum
of one million, seven hundred and ninety-six thousand,
527 five hundred and twenty-two and 20/100 dollars (1,796,522.20)
with interest thereon at the rate of five per cent (5%) per annum from May 1st, 1918, to the date of voucher for final payment.

8. That the Board of Appraisers in making said award unjustly and wrongfully refused to allow compensation to the said trustees for certain strips or parcels of land situated within the boundaries of certain streets, 61st, 62nd, and 63rd Streets, from the westerdy side of First Avenue to New York Bay, laid out on the Land Map of the city of New York, though not yet opened, upon the ground that said lands were not the property of the said trustees, but had been previously conveyed and delivered by the said trustees or their predecessors to the city of New York in trust for street purposes; that the amount of land in such proposed streets, for which said Board of Appraisers so refused to allow compensation, was eighty-one thousand, one hundred and twenty (81,120) sq. ft.

9. That the sum of one million, seven hundred ninety-six thousand, five hundred twenty-two and 20/100 ($1,796,522.20) dollars is not just compensation to the owner of said property so requisitioned as aforesaid.

10. That thereafter the plaintiff duly notified the United States of America that the compensation so determined was not satisfactory to the plaintiff, the plaintiff being the person entitled to receive the same, and rejected the said award and thereafter plaintiff, on or about the 11th day of July, 1918, was paid seventy-five per cent
(75%) of the amount so determined by the said Board of Ap-
528 praisers, to wit, the sum of one million, three hundred and
forty-seven thousand, three hundred and ninety-six and 65/100 dollars ($1,347,396.65), with interest thereon at five per cent (5%) from May 1st, 1918, to said date of closing, July 11th, 1919, being the date of voucher for final payment, and the plaintiff conveyed the said property hereinbefore described in fee simple to the United States of America, free and clear of all liens and encumbrances, in consideration of said amount and such further sum as might be awarded by the United States court as just compensation therefor.

11. That prior to the said conveyance being accepted by the United States of America the title to the property therein described and hereinbefore set forth had been duly examined by the legal authorities of the United States, who duly reported that the said property was duly vested in the said trustees, as hereinbefore alleged, free and clear from all encumbrances except as to the portions of the premises alleged to have been conveyed by the plaintiff's predecessors

to the city of New York by deed dated April 25th, 1899, being beds of alleged 61st, 62nd, and 63rd Streets from the westerly side of First Avenue to New York Bay, and for which no compensation was awarded by the said board.

12. At the time of the taking and appropriation of said property on April 6th, 1918, and May 31st, 1918, by the United States of America the fair and reasonable market value thereof was the sum of three million four hundred and twenty-eight thousand six hundred and forty-four dollars ($3,428,644).

13. That just compensation herein for the taking and
528 appropriation of said property hereinbefore described by the United States of America for public use is the sum of three million four hundred twenty-eight thousand six hundred and forty-four dollars ($3,428,644), with interest thereon at the rate of six per cent (6%) per annum from the date of appropriation and dispossession of the owner therefrom.

14. That the date of the appropriation and dispossession of the owner of said property hereinbefore described was April 6th, 1918, except such portions thereof as were within the proposed limits of 58th and 63rd Streets from the westerly side of First Avenue to the pierhead line, such streets not yet being opened, amounting in area to one hundred sixty-seven thousand two hundred ninety-five and two hundred and forty-nine thousandths (176,295.249) square feet, and as to such last-mentioned property the date of appropriation and dispossession of the owner was May 31st, 1918.

15. That on April 25th, 1899, the trustees of the Langley estate executed and delivered a deed to the city of New York purporting to convey to the city of New York in trust, for street purposes, certain property, including real property, within the boundaries of 61st, 62nd, and 63rd Streets, if projected, from the westerly line of First Avenue to the New York Bay.

16. That the consideration for such deed was the possible future exemption of the remainder of said property owned by the said trustees from assessment on any future proceedings by the city of
529 New York for the opening of said streets; that the property within the limits of 61st, 62nd, and 63rd Streets from the westerly line of First Avenue to New York Bay remained in the possession of the grantors; that such streets—61st, 62nd, and 63rd Streets—were not opened by the city of New York.

17. That the fair and reasonable market value of the said property requisitioned by the United States of America for public purposes at the time of such requisitions was three million four hundred twenty-eight thousand six hundred and forty-four dollars ($3,428,644), whether or not the city of New York held title to the lands within the proposed limits of 61st, 62nd, and 63rd Streets, if projected from the westerly line of First Avenue to New York Bay in trust for street purposes.

18. That no part of the said sum of three million four hundred and twenty-eight thousand six hundred and forty-four dollars

($3,428,644) has been paid by the defendant The United States of America to the plaintiff except the sum of one million three hundred and forty-seven thousand three hundred and ninety-six and 65/100 dollars ($1,347,396.65), being an amount equal to seventy-five per cent (75%), with interest thereon at five per cent (5%) to the date of payment, July 11, 1918, of the said award of said Board of Appraisers.

19. That the amount to be added to the said seventy-five per cent (75%) of said award, viz, one million three hundred forty-seven thousand three hundred and ninety six dollars and 65/100 ($1,347,396.65) to make up an amount as will be just compensation for such property so requisitioned by the United States of America is the sum of two million eighty-one thousand two hundred forty-
530 seven dollars and thirty-five cents ($2,081,247.35), with interest thereon at the rate of six per cent (6%) per annum on one million eight hundred seventy-eight thousand one hundred and fifty dollars and ninety-two cents ($1,878,150.92) from April 6th, 1918, amounting at the date hereof to three hundred and nine thousand five hundred and eighty-one dollars and 88/100 ($309,581.88); and on two hundred and three thousand and ninety-six dollars and forty-three cents ($203,096.43) from May 31st, 1918, amounting at the date hereof to thirty-one thousand six hundred and fifteen dollars and thirty-four cents ($31,615.34).

20. That in addition the amount to be added to the said seventy-five per cent (75%) of said award to make up an amount which will be just compensation for such property is the sum of one per cent (1%) per annum on seventy-five per cent (75%) of said award, to wit, one million three hundred and forty-seven thousand three hundred and ninety-six dollars and sixty-five cents ($1,347,396.65) from April 6th, 1918, to July 11th, 1919, amounting to seventeen thousand and twenty-nine dollars and sixty cents ($17,029.60).

21. That the total amount to be added to the said seventy-five per cent of said award to make up an amount which will be just compensation for such property so taken and appropriated for public use by the United States of America is the sum of two million four hundred thirty-nine thousand four hundred seventy-four and seventeen one hundredths dollars ($2,439,474.17).

22. That the city of New York is a municipal corporation existing under the laws of the State of New York.

531 23. That the city of New York had no right, title, or interest in and to any of the hereinbefore described property at the time of the appropriation thereof.

24. That the last will and testament of William C. Langley, late of the county of Kings, who died on or about December 1, 1890, is dated February 8, 1890, and is as follows:

"In the Name of God. Amen.

"I, William C. Langley, of the city of New York, merchant, do make, publish, and declare this my last will and testament.

"First. I give and bequeath to my son, William H. Langley, one million dollars.

"Secondly. I give and bequeath to Charles C. Goodrich, who now is and for many years has been my partner in business, one hundred thousand dollars.

"Thirdly. I give and bequeath to Alice M. Bowker (who for many years has resided in my family) an annuity of three thousand dollars, to be paid to her by my executors and trustees in quarter-yearly payments of seven hundred and fifty dollars each, the first payment to be made three months after my death, and thereafter payments shall be made quarter-yearly so long as she shall live.

"I direct my executors within six months after the probate of this will to execute an instrument in writing whereby they shall designate three full blocks of my lands in the town of New Utrecht, Kings County, New York, lying between Sixty-third and Sixty-fifth Streets and Third and Fourth Avenues as laid down in the plot of New Utrecht, being continuations of the same streets and avenues as laid down on the map of the city of Brooklyn, and I charge the
532 said annuity as a lien on the three blocks so designated. My executors and trustees may, however, at any time in their discretion sell and dispose of the said three blocks or any part thereof, and in case of such sale or other disposition the lien above created shall cease and the portions sold or disposed of shall after such sale or disposition be free therefrom. They shall, however, substitute in lieu of the lands so released other lands or securities of equal value.

"I authorize Alice W. Bowker, with the concurrence and approbation of my executors, to select from my personal effects such articles as she may require for her personal use. And I give and bequeath to her the articles so selected, such selections to be made by her within three months next after the probate of this my will.

"I desire my executors to keep my burial plot in the cemetery at Medfield, Massachusetts, in good order, and I authorize them from time to time to expend for that purpose and for improving and embellishing the same such sums as in their judgment may be proper. In case that my son shall wish that his remains or those of his wife and children shall be buried in said plot, I authorize such burial. I also authorize the burial of Alice M. Bowker in said plot, if such should be her desire.

"Fourthly. If Henry L. Kemp, now in my service, shall be so employed at the time of my death, I give and bequeath unto him the sum of five thousand dollars.

"Fifthly. I give, devise, and bequeath all the rest and residue of my property of every kind and character wheresoever situate and that may remain after the payment of my debts and the legacies hereinbefore given to my executors and trustees hereinafter named, to be by them held in trust; that is to say, in trust during the
533 life of my son, William H. Langley, as to my real estate to demise and let the same from time to time, and as to personal

estate, to invest, manage, and control, the same in their discretion, and to collect and receive the income thereon, and after defraying all charges thereon to pay the net income when received to my said son during his life. And at the death of my son to assign, transfer, and pay whatever may then be held under this trust to his children who may survive him, so that each of his children shall receive an equal share thereof.

"I hereby authorize and empower my said executors and trustees and their successors and successors, to sell at their discretion as to the time and terms and at public or private sale, all and every part of my real estate, and to execute and deliver all necessary and proper assurances and conveyances for the same to the respective purchasers thereof.

"I nominate, constitute, and appoint my son, William H. Langley, and my friend, Charles G. Goodrich, to be executors of and trustees under this my last will and testament, and I desire and hereby request that they shall not be required by reason of nonresidence in this State, or for any other reason, to give any bond or security either as executors or trustees.

"My will is that my said executors and trustees shall not charge or receive any commissions or compensation for their services as executors or trustees. I have had this in mind in making the bequests herein contained in their favor.

"Lastly, I hereby revoke all other wills by me made.

"In witness whereof I have hereunto subscribed my name
534 at the city of New York on the eighth day of February, one thousand eight hundred and ninety, in the presence of B. F. Dunning, F. P. Fowler, and Wm. F. Dunning, attesting and subscribing witnesses at the same time declaring this to be my last will and testament.

"WM. C. LANGLEY. [L. S.]

"Subscribed by the testator in the presence of us and declared by him at the time of making such subscription to be his last will and testament, whereupon we at his request in his presence and in the presence of each other, have subscribed our names as witnesses, attesting the execution thereof, this certificate having been first read aloud to the testator in his and our presence and hearing.

"On the third page, in the fourth line, the words 'wife' 'and' were interlined before execution.

"B. F. DUNNING,
"*37 West 38th Street.*
"THOMAS P. FOWLER,
"*39 East 68th Street.*
"W. F. DUNNING,
"*214 West 44th Street.*"

535 Conclusions of law.

1. That at the time of appropriation thereof by the United States of America, William H. Langley and George F. Benedict, as

trustees of the trusts created by the last will and testament of William C. Langley, deceased, were the owners in fee and duly seized and possessed of the following described property, situate, lying and being in the Borough of Brooklyn, city of New York and State of New York, and situated within the jurisdiction of the United States District Court for the Eastern District of New York, described as follows:

"All those certain lots, pieces or parcels of land, situate, lying and being in the Borough of Brooklyn, county of Kings, State and city of New York, more particularly described as follows:

"Parcel No. 1.

"Beginning at the point of intersection of the westerly line of First Avenue and the centre line of Fifty-eighth Street; running thence westerly along the centre line of 58th Street and its prolongation eighteen hundred and twelve (1812) feet and seven inches (7) more or less to the pierhead line established by chapter 491 of the laws of the State of New York of 1884 and approved by the Secretary of War on March 4th, 1890; thence southerly along said pierhead line two hundred and sixty feet (260) and four inches (4) to a point opposite the prolongation of the centre line of 69th Street; thence easterly along the centre line of Fifty-ninth Street and its prolongation eighteen hundred and nineteen feet and seven inches (7) more or less to the westerly line of First Avenue; and thence northerly along the westerly line of First Avenue two hundred and sixty feet (260) and four inches (4) more or less to the point or place of beginning, containing approximately four hundred and seventy-two thousand, seven hundred and eighty and one-tenth (472,780.1) square feet.

"Parcel No. 2.

"All that certain lot, piece or parcel of land beginning at the point of intersection of the westerly line of First Avenue and the southerly line of Sixty-third Street and its prolongation; running thence
536 northerly along the westerly line of First Avenue six hundred and sixty-eight (668) feet and one (1) inch to a point one hundred and eighteen feet and one inch northerly from the centre line of Sixty-first Street; running thence westerly at right angles to the westerly line of First Avenue eighteen hundred and thirty-four (1834) feet and five and one-half inches (5½) more or less to the pierhead line above described; thence southerly along said pierhead line approximately six hundred and sixty-eight (668) feet to a point on said pierhead line formed by the intersection therewith of the Southerly line of 63rd Street prolonged; thence easterly along the southerly line of 63rd Street prolonged eighteen hundred and eighty-two (1882) feet three and three-eighths inches (3⅜) more or less to the point of beginning, containing approximately one mil-

lion, two hundred and forty-one thousand five hundred forty-one and nine-tenths (1,241,541.9) square feet."

2. That the plaintiff is entitled to receive from the United States of America a sum, which added to said seventy-five per cent of the award herein, will be just compensation for the taking and appropriation of the property hereinbefore described.

3. That just compensation for the property hereinbefore described is the fair and reasonable market value thereof at the date of appropriation.

4. That the fair and reasonable market value of the property of the plaintiff hereinbefore described at the time of the appropriation was three million, four hundred twenty-eight thousand, six hundred and forty-four dollars ($3,428,644).

5. That the amount to be added to said sum of seventy-five per cent of the award herein, to make just compensation by the United States of America for the property hereinbefore described is two million, eighty-one thousand, two hundred forty-seven and 35/100 dollars ($2,081,247.35), with interest thereon at the rate of six 536½ per cent per annum on one million, eight hundred and seventy-eight thousand, one hundred and fifty dollars and ninety-two cents ($1,878,150.92) from April 6th, 1918, amounting at the date hereof to three hundred and nine thousand, five hundred eighty-one dollars and eighty-eight cents ($309,581.88); and on two hundred and three thousand and ninety-six dollars and forty-three cents ($203,096.43) from May 31st, 1918, amounting at the date hereof to thirty-one thousand, six hundred and fifteen dollars and thirty-four cents ($31,615.34); and the sum of seventeen thousand and twenty-nine dollars and sixty cents ($17,029.60) totaling two million, four hundred and thirty-nine thousand, four hundred and seventy-four dollars and seventeen cents ($2,439,474.17).

6. That the conveyance by the trustees to the city of New York on April 25th, 1899, hereinbefore referred to, was not such a sale as the trustees had power to make under the will of William C. Langley, hereinbefore referred to, and was void.

7. That the city of New York had no right, title, or interest in the hereinbefore described property, or any part thereof, at the time of the taking thereof.

8. That the plaintiff should have judgment against the United States of America for two million four hundred and thirty-nine thousand four hundred and seventy-four dollars and seventeen cents ($2,439,474.17), together with the costs and disbursements incurred in this action.

I direct the entry of judgment accordingly.

Dated Post Office Building, Borough of Brooklyn, City of New York, January 5th, 1921.

(Signed) EDWIN L. GARVIN,
*United States Judge.*

537 United States District Court for the Eastern District of New York.

GEORGE F. BENEDICT AS SOLE SURVIVING TRUSTEE OF THE trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA AND THE CITY OF NEW YORK, defendants.

STATE OF NEW YORK,
*County of New York, ss:*

CHARLES K. FINCH, being duly sworn, deposes and says:

I am a clerk in the office of Gannon, Seibert & Riggs, attorneys for the plaintiff herein, and that on the 6th day of January, 1921, at 1.30 o'clock p. m. I served the annexed judgment and notice of entry upon Honorable LeRoy W. Ross, attorney for the United States of America, by leaving it in a conspicuous place in his office, post office building, Borough of Brooklyn, city of New York, said attorney being absent at the time of such service.

(s) CHARLES K. FINCH. [L. S.]

Sworn to before me this 6th day of January, 1921.

(s) WILLIAM L. O'CONNOR,
*Notary Public.*

538 United States District Court for the Eastern District of New York.

GEORGE F. BENEDICT AS SOLE SURVIVING TRUSTEE OF THE Trusts created by the last will and testament of William C. Langley, deceased, plaintiff,
*against*
UNITED STATES OF AMERICA AND THE CITY OF NEW York, defendants.

This cause having come regularly on to be heard, and having been brought to trial before Honorable Edwin L. Garvin, United States judge, on the 11th, 12th, and 13th days of May, 1920, and the plaintiff and the defendants appearing by counsel, and the parties having stipulated in writing that a jury herein should be waived, and that the case should be disposed of by Honorable Edwin L. Garvin, United States judge, without a jury, and said stipulation having been filed with the clerk, and the said judge having made and filed his decision containing findings of fact and conclusions of law separately stated and numbered, directing judgment as hereinafter stated, and the costs and disbursements of the plaintiff having been taxed against the United States of America by the clerk of this court at $21.30;

Now, on motion of Gannon, Seibert & Riggs, attorneys for the plaintiff, it is

Adjudged that the plaintiff recover of the defendant, United States of America, the sum of two million four hundred and
539 thirty-nine thousand four hundred and seventy-four dollars and seventeen cents ($2,439,474.17), and the sum of twenty-one dollars and thirty cents ($21.30), costs and disbursements as so taxed, amounting in all to the sum of two million four hundred thirty-nine thousand four hundred ninety-five dollars and forty-seven cents ($2,439,495.47).

Dated, January 5th, 1921.

(S) PERCY G. B. GILKES,
*Clerk.*

(Indorsed:) United States Circuit Court of Appeals for the Second District. George F. Benedict, as sole surviving trustee of the trusts created by the last will and testament of William C. Langley, deceased, plaintiff (defendant in error and appellee), against United States of America and City of New York, defendants (plaintiff's in error and appellants). Affidavit and notice of motion. Gannon, Seibert & Riggs, attorneys for appellee, office and post-office address two Rector Street, New York City.

540 *Decision on motion.*

The motion to dismiss the writ of error in this case is denied. The motion to dismiss the appeal is granted. See the decision of the Supreme Court of the U. S. in U. S. v. Pfitsch, rendered June 1, 1921.

H. W. R.
C. M. H.
M. T. M.

JUNE 7TH, 1921.

541 At a stated term of the United States Circuit Court of Appeals for the Second Circuit held at the court rooms in the post-office building, city of New York, on the 17th day of June, 1921.

Present, Hon. Henry Wade Rogers, Hon. Charles M. Hough, Hon. Martin T. Manton, circuit judges.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE, etc., plaintiff (appellee and defendant in error).
*v.*
UNITED STATES OF AMERICA AND CITY OF NEW YORK, defendants (appellants and plaintiff in error).

A motion having been made herein by counsel for the plaintiff to dismiss the appeals and writs of error taken herein upon the ground that the court is without jurisdiction to hear the same;

Upon consideration thereof, it is

Ordered that the motion to dismiss the writs of error be, and the same hereby is, denied; and it is further

Ordered that the motion to dismiss the appeals be, and the same hereby is, granted.

H. W. R.
C. M. H.

Endorsed: United States Circuit Court of Appeals, Second Circuit. Geo. F. Benedict v. United States & City of New York. Order. United States Circuit Court of Appeals, Second Circuit. Filed Jun. 17, 1921. William Parkin, clerk.

542 United States Circuit Court of Appeals for the Second Circuit.

No. 94—October term, 1921.

Argued December 14, 1921. Decided January 18, 1922.

UNITED STATES OF AMERICA AND THE CITY OF NEW York, plaintiffs in error (defendants below),
*against*
GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trusts created by the last will and testament of William C. Langley, deceased, defendant in error (plaintiff below).

In error to the District Court of the United States for the Eastern District of New York.

Before HOUGH, MANTON, and MAYER, circuit judges.

Writs of error to a judgment entered after trial with jury waived, in the District Court for the Eastern District of New York.

Defendant in error (who will be hereafter referred to as the Langley Estate) owned in 1918 a considerable body of land, consisting both of upland and land under water in the county of
543 Kings and city of New York, and extending, according to the Langley contention, from First Avenue, Brooklyn, to the pierhead line in the waters of New York Harbor. It was separated into two parts, one extending from the center line of 58th Street to the corresponding line of 59th Street, and the other from the southerly line of 63rd Street to a point 118 feet north of the centre line of 61st Street. The area of the whole property was as found by the court below 1,714,322 sq. ft.

The property had been in the Langley family for many years, but defendant in error held title by virtue of the will of William C. Langley, deceased, which conferred a power upon this defendant in error and his predecessors in office in the following words:

"I hereby authorize and empower my said executors and trustees and their successor and successors to sell at their discretion as to the time and terms, and at public or private sale, all and every part of my real estate, and to execute and deliver all necessary and proper

assurances and conveyances for the same to the respective purchasers thereof."

In assumed compliance with this power the trustees of the Langley Estate for the time being conveyed on April 25, 1899, to the city of New York as much land as was necessary to continue (through the Langley property) 61st, 62d, and 63d Streets to (as the deed stated) "the New York bay."

Such conveyance was executed not only in pursuance of the testamentary power aforesaid but of section 992 of the Charter of the City of New York, which provides in substance that "the owners of land * * * within the lines of any street * * * on the plan of the city of New York and comprising all the land within said lines in an entire block in extent may" convey the same free of
544 encumbrances to the city. If the city accepts such conveyance it "shall become vested with the title to said lands to the same effect and extent as if they had been acquired" in a condemnation proceeding for street purposes. After such conveyance "the lands fronting on that portion of the streets so conveyed, and extending to the centre of the block on either side of such portion of said street as conveyed" shall not be chargeable (in effect) with any assessments consequent upon the "opening the residue or any portion of the residue of such street."

From 1899 to 1918 the streets in question remained unopened in the sense that they were not used as highways. The entire property was not improved as a water front; some filling was done by which the area of land above water was somewhat increased, but whether by 1918 the process of filling had been extended to the bulkhead line as then authorized is a matter not specifically found by the lower court.

On April 6, 1918, the United States acquired title to one of the above-stated parcels of Langley realty and at a slightly later date to the other parcel, such acquisition being by virtue of what is known as the Lever Act of 1917 (40 Stat. 276), whereof the important section is the 10th, as follows:

"That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said
545 seventy-five per centum will make up such amounts as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies."

Pursuant to that statute the Executive appointed a commission for the purpose of ascertaining and paying a "just compensation for what had been taken or requisitioned"—which included all that the Langley Estate had conveyed to the city of New York in 1899. The governmental commission determined that just compensation was $1,796,522.20, with interest at five per cent from May 1st, 1918. This was in effect a determination that the property was worth $1.10 per square foot, and that the Langley Estate was entitled to be paid at that rate for all of the land except so much as lay within the limits of 61st, 62d, and 63d Streets "if projected between the westerly line of First Avenue and the high water line" as shown on the plan attached to the city's deed. The area of these street beds as above described was found to be 81,120 square feet.

This award was not satisfactory to the Langley Estate in that (1) $1.10 per square foot was not enough, and (2) the city's title to the street beds was recognized in reduction of its acreage.

Therefore this suit was brought pursuant to the act of Congress above set forth.

The United States was originally the sole defendant, and on its motion the court below ordered that the city be "brought in as a party defendant" and that a supplementary summons issue accordingly. Such summons issued, an amended complaint was filed, in which it was alleged that the city "by reason of the alleged deed" above referred to claimed an "interest either substantial or nominal in the streets hereinbefore referred to adverse to that of the
546 plaintiff." The city appeared and answered, asserting title in itself in said streets and in an area of 81,120 square feet, and prayed for the dismissal of the complaint and for "such other and further relief as to the court may seem just and proper."

The trial court (270 Fed. 267) determined (by formal findings of fact and conclusions of law) that the fair and reasonable value and therefore just compensation for what the United States had taken was $3,428,644, or at the rate of $2 per square foot.

It further found that the value was the same "whether or not the city of New York held title to the lands within," the streets heretofore mentioned, but that the above referred to conveyance of 25th April, 1899, was void, wherefore the title to the entire property taken was in Langley Estate, and to it should be awarded the entire recovery.

To judgment accordingly both the United States and the city of New York took writs of error.

Henry J. Walsh, assistant United States attorney, for the United States;

Charles J. Nehrbas, assistant corporation counsel, for the city of New York;

Royal E. T. Riggs, for Langley Estate.

HOUGH, *C. J.*

Defendant in error suggests rather than asserts that this court has no jurisdiction, because the statute intended when it gave to the

district court power to "hear and determine" that the determination of that tribunal should be final.

We do not so read United States vs. Pfitsch (Sup. Ct., June 1, 1921). On the contrary, we think it was there plainly held that Con-
547 gress intended in section 10 to preserve the right to a jury and to create a cause of action governed by the "usual procedure of a district court in actions at law for money compensation." That such usual procedure gives rise to a final decision over which (under Jud. Cod. 128) this court "shall exercise appellate jurisdiction" seems especially plain.

The writ taken by the United States under guise of objecting (1) to certain evidence and (2) to the allowance of interest really complains of the size of the award.

It is not denied that since the only contest between the Langley Estate and the Nation was the value of what the latter had taken, the one thing incumbent upon the plaintiff to prove was the fair and reasonable market value of this land. Further, it is admitted that there were no actual sales of similar property within reasonable limitations of time and contiguity upon which to base decision. The only possible evidence was that of experts, i. e., persons who had studied the pecuniary possibilities of large lots of land abutting upon the waters of New York Harbor.

As matter of law, expert testimony under even far less extreme circumstances than those just stated is admissible, as we held in Shields vs. Norton, 143 Fed. 802.

Under law too well settled to require citation, the finding of the court below in an action at law where a jury has been duly waived has all the force of a verdict, and it is sufficient on this point to say that none of the opinion evidence offered by the experts on both sides was unlawfully received. There was beyond all question some evidence upon which to base a finding of value in the sum of $2 per square foot.

As to interest, it is to be noted that the acquisition of property under the Lever Act is only a summary species of what are commonly called condemnation proceedings. The justification for any condemnation is the necessity of taking something from a private person for a public use; and the justification for the summary procedure of the act under consideration is the overwhelming necessity for
548 speed under the dreadful pressure of war. But whether the taking be by the familiar condemnation of peace or by the strong arm of a nation at war, the obligation upon the taker is always that recognized in this very statute, viz: to make "just compensation" to the owner. (Monongahela, etc., Co. vs. United States, 148 U. S. 312); and see a general consideration of the matter in National City Bank vs. United States, 275 Fed. 855.

It is certain that the national immunity from payment of interest does not extend to condemnation proceedings. (United States vs. Rogers, 257 Fed. 397; United States vs. Highsmith, 257 Fed. 401, affirmed U. S. S. C., Feb. 28, 1921.

Since, therefore, just compensation by definition includes interest (Co. Agency, etc., Co. vs. American, etc., Co., 258 Fed. 363, p. 369), and this statutory method of arriving at compensation is analagous to condemnation proceedings, we are of opinion that the statutory rate prevailing in New York was rightfully allowed. No error is discovered upon the writ of the United States.

The city's writ raises questions which may be stated as they are put by defendant in error; the Langley Estate deed to the city conveyed nothing because (1) the trustees had no power to convey, and (2) the city had no power to receive; and if both these propositions be swept aside, then (3) the city's ownership is of such a nature as to make no difference in the award to plaintiff below.

The alleged inability of the Langley trustees to convey is based upon the terms of their power to sell as embodied in the will which created them plus the real property law of New York (sec. 105, subd. 1), which provides that:

"If the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee in contravention of the trust * * * shall be void."

But it will not do to stop with any narrow definition of the word "sell," which in its ordinary sense means a transfer of
549 property for a fixed price in money or its equivalent (The Five Per Cent cases, 110 U. S. 471, at page 478). That immunity from assessments for street openings might be the equivalent of the definition is assuredly an arguable point with those acquainted with the certain weight of that burden in the city of New York.

But the broader view is to consider the history of this land as revealed by the record and the disposition thereof made by Langley the testator. It was plainly his intent to make as easy as possible the carrying of this land until the time came for its development. It was to that end that he gave to his trustees such extensive powers, and it must be assumed, in construing his will (including the quoted power) that it was the testator's desire that the authority he gave should be used in furtherance of his general purpose.

This property had come to be a most valuable water front; harbor development had caught up to it, defendant in error's argument rather broadly asserts that it was the last large frontage left unimproved and on the bay. To such a property streets are a necessity; access to the water front is a necessity of any development, in which respect property of this kind does not differ from other unimproved urban holdings.

It is pressed upon us that the state decisions, viz, Russell vs. Russell, 36 N. Y. 581; Scholle vs. Scholle, 113 N. Y. 261; Turco vs. Trimboli, 152 App. Div. 431, and Wellbrock vs. Roddy, 169 App. Div. 251, compel the conclusion that nothing but a cash sale will satisfy the terms of the will. An examination of these authorities will show that in each instance decision was rested upon the facts of the case in hand, and no such absolute rule as is here contended for

was laid down; while in Thomas vs. Evans, 105 N. Y. 601, is pre
sented a litigation far more nearly resembling the present; and i
that case the court stated the point here made—and proceeded t
decide the cause on other grounds.

550 On the other hand, the Matter of 67th Street (60 How. Pr
264) is, in the reasoning of Judge Daniels, perfectly applicabl
to this case. That learned justice, aguing from the obvious purpos
and intent of a testator who left a large unimproved tract of urba
property and gave to his personal representatives a power of sale sub
stantially like the one at bar, found in that testator's executors
capacity so completely to divest themselves of title by merely selling
lots as abutting upon unopened streets as to debar the estate they rep
resented from receiving any compensation for the taking of their land
when the streets were actually opened. If executors or trustees who
never in terms exercised a power of sale in the premises could in effect
merely surrender that which they had power only to sell (as this de
fendant in error would argue), it would seem plain that executors
who wished to do exactly the same thing could arrive at the desired
result for a valuable consideration.

The 67th Street case was largely rested upon Earle vs. The Mayor,
38 N. J. Law, 47, and both the decisions last cited were specifically
approved in Simmons vs. Crisfield, 197 N. Y., 365. We therefore
hold that the Langley trustees had authority to do what they did in
1899, and (as pointed out by Daniels, J.) it is not necessary to inquire
whether the conveyance in question was merely in fulfillment of a
power or the act of a trustee as such.

The second proposition, viz, that the city had no power to take
the property is based upon that portion of 992 of the city charter
which requires such conveyances to be by the owners of land "an
entire block in extent," and it is said that the distance from that
street which was nearest the shore line to the shore was not a "block
long."

The exact number of feet from this street to the shore line is
not specifically found, and we do not think any such finding ma
terial; for it is admitted that however long or short was
551 that distance is measured the space between a street and
navigable water.

The meaning given by lexicons of authority to the word "block"
has often been judicially recognized, to wit, "the portion of a city
enclosed by streets whether occupied by buildings or not (Harrison
vs. People, 195 Ill. 466)." But we must recognize obvious facts in
a city like New York, delimited or marked off not always by streets
but by water, and navigable water, which is as much a highway as
any street; indeed it has been held, and in respect of New York City,
that "the general public has a right of passage over the places
where land highways and navigable waters meet" (Knickerbocker
etc. Co. vs. 42d Street, etc. Co., 176 N. Y. 408, at page 417.) We
therefore do not hesitate in holding that a block within the meaning

of the quoted section of the charter covers the distance between an existing street and the navigable waters of New York Harbor.

By the conveyance of 1899 the city became vested with title to a portion of the land taken by the United States, for which the defendant in error has been awarded compensation, and the extent of that land is proven and found to be 81,120 sq. ft., and it was wort $2 a sq. ft. on April 6, 1918. Although it owned this land it held it "intrust for the public use." (Knickerbocker, etc. Co. vs. 42d Street, etc. Co., supra.)

It is now argued that with a title of this kind and on evidence proving that "whether or not the city held title to" the 81,120 sq. ft., the value of the entire property was just the same, and the award to the Langley Estate should not be disturbed in amount.

But if the record be examined to ascertain why the expert witnesses substantially agreed that the value of the land was unchanged by the conveyance for street purposes, it is found that they all said in effect that the street value (i. e., land value of the streets) was "reflected" in the value of the land as bounded or limited by the proposed streets.

This means that if and when the streets were opened the abutting property would, by reason of the streets, be worth
552 at least as much more as was the value of the land appropriated for highway purposes.

But no streets have been opened in the physical sense, and the city owns the surface to be devoted to streets. That it is held in trust for a public purpose does not in any way change its market value, and the city has been as much deprived of what it owned as was the Langley estate. To put it another way, the Langley Estate has been awarded all that the land is worth, streets and all, because when streets are opened the land they have left will be worth the amount of the award. This will not do. The Government is called upon to make just comp'nsation for things as they are, not as they may be hereafter, and the compensation must flow to those who were actually deprived of what they own.

Since the valuation of this property on the testimony adopted by the court below is a mere matter of computation, and since the street land was taken on April 6, 1918, it follows that the record before us shows that the city has been deprived of and is entitled to compensation for 81,120 sq. ft. of land, worth $2 per ft., or $162,240, with interest thereon at 6% from April 6, 1918. The judgment is therefore excessive so far as the Langley Estate is concerned, but under such circumstances, where the error is capable of correction by computation only, a reversal is not necessary; a remittitur or its equivalent may be directed by the appellate court (Van Boskerck vs. Torbert, 184 Fed. 419.) Usually the remittitur ordered merely reduces the recovery against the defendants generally, but in this instance the remittitur should be in effect an assignment to the defendant the city of New York of its just proportion of the judgment, to

wit, $162,240, with interest thereon from April 6, 1918. Upon the filing of such assignment within thirty days from the rendition of this decision the judgment will be affirmed; otherwise judgment reversed and a new trial awarded. The issuance of any mandate will be delayed for the above period of thirty days.

553 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA AND THE CITY OF NEW York, plaintiffs in error (defendants below),
*against*
GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trusts created by the last will and testament of William C. Langley, deceased, defendant in error (plaintiff below).

Whereas, by decision of the above-entitled court made January 18th, 1922, said George F. Benedict as sole surviving trustee of the trusts created by the last will and testament of William C. Langley, deceased, is therein directed, within thirty days from the date thereof, to assign of the judgment entered herein on January 25th, 1921, for the sum of two million, four hundred and thirty-nine thousand, four hundred and ninety-four dollars and forty-seven cents ($2,439,494.47) the sum of one hundred sixty-two thousand, two hundred and forty dollars ($162,640) thereof with interest thereon from April 6th, 1918, to the city of New York, and

Whereas it is therein provided in said decision that upon the filing of said assignment within thirty days from the rendition thereof the judgment will be affirmed;

Now, therefore, in compliance with the direction contained in the decision of the above-entitled court filed in the above-entitled action on January 18th, 1922, said George F. Benedict as sole surviving trustee of the trusts created by the last will and testament of William C. Langley, deceased, hereby assigns, transfers, and
554 sets over unto the City of New York and its successors, the sum of one hundred sixty-two thousand two hundred and forty dollars ($162,240) of said judgment, with interest on said one hundred sixty-two thousand two hundred and forty dollars ($162,240) from April 6th, 1918, and the said George F. Benedict as trustee as aforesaid hereby constitutes and appoints the said the city of New York and its successors his true and lawful attorneys, irrevocable, with power of substitution and revocation, for the use and at the proper costs and charges of said the city of New York and its successors, to ask, demand, and receive and take all lawful ways for the recovery, of the said one hundred sixty-two thousand, two hundred and forty dollars ($162,240) due or to become due on the said judgment, and on payment to acknowledge satisfaction or discharge the same.

Provided, however, that should the Supreme Court of the United States upon review of this cause determine that the decision of this court in requiring the assignor herein to execute and file this assign-

ment be erroneous for any reason, then this assignment shall be null and void.

GEORGE F. BENEDICT,
*As sole surviving trustee of the trusts created by the last Will and Testament of William C. Langley, deceased.*

STATE OF NEW YORK,
*County of New York, ss:*

On this 28th day of January, 1922, before me personally came and appeared George F. Benedict, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

[SEAL.] WILLIAM L. O'CONOR,
*Notary Public, Queens County, Queens County Clerk's number 1126, Certificate filed in New York County Clerk's No. 142. Register's No. 2122.*

Commission expires March 30, 1922.

555 Approved as to form.

JOHN P. O'BRIEN,
*Corporation Counsel.*

Approved as in compliance decision January 18th, 1922.

C. M. HOUGH,
*Circuit Judge.*
J. M. MAYER,
*Circuit Judge.*

556 At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court rooms in the post-office building in the city of New York, on the 31st day of January, one thousand nine hundred and twenty-two.

Present: Hon. Charles M. Hough, Hon. Martin T. Manton, Hon. Julius M. Mayer, circuit judges.

UNITED STATES AND THE CITY OF NEW YORK, plaintiff in error,
v.
GEORGE F. BENEDICT AS SOLE SURVIVING TRUSTEE, ETC., defendant in error.

Error to the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said district court be, and it hereby is, affirmed with interest.

C. M. H.
M. T. M.

It is further ordered that a mandate issue to the said district court in accordance with this decree.

557 (Indorsed:) United States Circuit Court of Appeals, Second Circuit. United States and City of N. Y. *v.* George F. Benedict. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 31, 1922. William Parkin, clerk.

558 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR (defendant below),
*against*
GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trusts created by the last will and testament of William C. Langley, deceased, defendant in error (plaintiff below).

Your petitioner, United States of America, plaintiff in error in the above-entitled cause, respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Second Circuit, and that a judgment has therein been rendered on the 31st day of January, 1922, affirming a judgment of the District Court of the United States for the Eastern District of New York, and that the matter in controversy in said suit exceeds one thousand dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the suit or controversy being citizens and citizens of the United States or citizens of the different States, and that this cause does not arise under the patent laws nor the revenue laws, nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; and therefore your petitioner would respectfully pray that a writ of error be allowed it in the above-

559 entitled cause directing the clerk of the United States Circuit Court of Appeals for the Second Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

UNITED STATES OF AMERICA,
*Plaintiff in Error.*

By RALPH C. GREENE,
*United States Attorney, for the Eastern District of New York, Room 211 P. O. Building, Brooklyn, N. Y.*

The foregoing petition is granted and writ of error allowed as prayed for.

MANTON,
*United States Circuit Judge.*

United States Circuit Court of Appeals for the Second Circuit. United States of America, plaintiff in error (defendant below), against George F. Benedict, as sole surviving trustee of the trusts created by the last will and testament of William C. Langley, deceased, defendant in error (plaintiff below). Petition for writ of error. Ralph C. Greene, United States attorney, Eastern District of New York, Room 211, P. O. Building, Brooklyn, New York.

560 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR (defendant below),
*against*
GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trusts created by the last will and testament of William C. Langley, deceased, defendant in error (plaintiff below).

On reading and filing the petition of the plaintiff in error, the United States of America, praying for a writ of error from this court to the Supreme Court of the United States, and the assignment of errors submitted herewith, it is

Ordered, that a writ of error within as prayed for be and the same is hereby allowed.

Dated April 26, 1922.

MANTON,
*United States Circuit Judge.*

United States District Court for the Eastern District of New York. United States of America, plaintiff in error (defendant below), against George F. Benedict, as sole surviving trustee of the trusts created by the last will and testament of William C. Langley, deceased, defendant in error (plaintiff below). Order allowing writ of error. Ralph C. Greene, United States attorney, Eastern District of N. Y.

561 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR (defendant below)
*against*
GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF the trusts created by the last will and testament of William C. Langley, deceased, defendant in error (plaintiff below).

And now comes the plaintiff in error, United States of America, by Ralph C. Greene, United States attorney for the Eastern Dis-

trict of New York, its attorney, and says that in the record of proceedings aforesaid of said United States Circuit Court of Appeals for the Second Circuit, in the above-entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error in this, to wit:

First. The said Circuit Court of Appeals erred in affirming the judgment of the District Court of the United States for the Eastern District of New York for the sum of $2,439,474.17 and the sum of $21.30, costs and disbursements of suit, entered on January 5, 1921, in favor of said defendant in error and against said plaintiff in error.

Second. The said Circuit Court of Appeals erred in not reversing the said judgment of the District Court of the United States for the Eastern District of New York aforesaid, and in not remanding said cause to said District Court for a new trial.

562 Third. The said Circuit Court of Appeals erred in holding that the special findings of fact by the said District Court were sufficient to sustain the judgment against the plaintiff in error and in favor of the defendant in error.

Fourth. The Circuit Court of Appeals erred in not sustaining so much of the 11th assignment of errors upon the record in said cause as sets out the 13th, 17th, 19th, 20th, and 21st findings of fact by the said District Court.

Fifth. The said Circuit Court of Appeals erred in not sustaining so much of the 14th assignment of errors upon the record in said cause as sets out the 4th, 5th, and 8th conclusions of law by the said District Court.

Wherefore the said United States of America, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above-entitled cause to the prejudice of the plaintiff in error, the said judgment of the said United States Circuit Court of Appeals be reversed, annulled, and for naught esteemed, and that said cause be remanded to the United States Circuit Court of Appeals for the Second Circuit with instructions to grant a new trial in said cause, or for such further proceedings in said cause as may be determined upon by this honorable court to the end that justice may be done in the premises.

RALPH C. GREENE,
*United States Attorney for the Eastern District of New York, Attorney for the Plaintiff in Error.*

United States Circuit Court of Appeals for the Second Circuit. United States of America, plaintiff in error (defendant below), against George F. Benedict, as sole surviving trustee of the trusts created by the last will and testament of William C. Langley, deceased, defendant in error (plaintiff below). Assignment of error. Ralph C. Green, U. S. Attorney, E. D. of New York, Brooklyn, N. Y.

563 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA AND THE CITY OF NEW York, plaintiff in error (defendants below),
vs.
GEORGE F. BENEDICT AS SOLE SURVIVING TRUSTEE OF the trusts created by the last will and testament of William C. Langley, deceased, defendant in error (plaintiff below).

Your petitioner The City of New York, one of the plaintiffs in error in the above-entitled cause, respectfully shows that the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Second Circuit, and that judgment has therein been rendered on the 31st day of January, 1922, affirming a judgment of the District Court of the United States for the Eastern District of New York, and that the matter in controversy in said suit exceeds one thousand ($1,000) dollars besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in anywise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different States, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, nor the trade-mark laws, nor the copyright laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; and therefore your petitioner would respectfully
564 pray that writ of error be allowed it in the above-entitled cause, directing the clerk of the United States Circuit Court of Appeals for the Second Circuit to send the record and proceedings in said court with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

And your petitioner further prays that the bond to cover the costs of the writ of error be dispensed with.

THE CITY OF NEW YORK,
*Plaintiff in Error,*
By JOHN P. O'BRIEN,
*Its Attorney.*
JOHN P. O'BRIEN.

The foregoing petition is granted and writ of error allowed as prayed for and the bond to cover costs of writ of error is dispensed with.

MANTON,
*Circuit Judge.*

United States Circuit Court of Appeals for the Second Circuit. United States of America and The City of New York, plaintiff in error (defendants below), vs. George F. Benedict as sole surviving trustee of the trust created by the last will and testament of William C. Langley, deceased, defendant in error (plaintiff below). (Copy.) Petition for writ of error. John P. O'Brien, corporation counsel, Municipal Building, Borough of Manhattan, New York City.

565 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA AND THE CITY OF NEW York, plaintiffs in error (defendants below),
*vs.*
GEORGE F. BENEDICT AS SOLE SURVIVING TRUSTEE OF THE trusts created by the last will and testament of William C. Langley, deceased, defendant in error (plaintiff below).

And now comes the plaintiff in error The City of New York, by John P. O'Brien, its attorney, and says that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Second Circuit, in the above-entitled cause, and in the rendition of the final judgment therein, manifest error intervene to the prejudice of said plaintiff in error in this, to wit:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States for the Eastern District of New York for two million four hundred thirty-nine thousand, four hundred and ninety-five dollars and forty-seven cents ($2,439,495.47) with interest thereon at six per cent (6%) per annum from January 5th, 1921, entered on the 5th day of January, 1921, in favor of said defendant in error and against United States of America, one of said plaintiffs in error.

Second. Said Circuit Court of Appeals erred in not sustaining the "second," "third," "fourth," "sixth," "seventh," "eighth,"
566 "ninth," "tenth," "eleventh," "twelfth," "thirteenth," "fourteenth," "fifteenth," "sixteenth," "seventeenth," and "eighteenth" assignments of errors upon the records in said cause in so far as said assignments relate to or affect those portions of 61st Street, 62nd Street, and 63rd Street from the high water mark of the New York Bay to the pierhead line established by chapter 491 of the laws of the State of New York of 1884, and approved by the Secretary of War on March 4, 1890.

Third. Said Circuit Court of Appeals erred in holding that the special findings of fact by the said District Court were sufficient to sustain the judgment recovered against United States of America, one of the plaintiffs in error.

Fourth. Said Circuit Court of Appeals erred in directing the defendant in error to assign to the city of New York of the judgment rendered by the District Court of the United States for the Eastern

District of New York only the sum of one hundred sixty-two thousand two hundred and forty dollars ($162,240) with interest thereon at six per cent (6%) per annum from April 6, 1918, and in not directing said defendant in error to assign to said the city of New York the further sum of five hundred and eighty-nine thousand seven hundred and thirty-one dollars and eighty-two cents ($589,731.82) with interest thereon at six per cent (6%) per annum from January 5, 1921, being the portion of said judgment of the said District Court which represents compensation awarded for the portions of 61st Street, 62nd Street, and 63d Street between the high-water mark of the New York Bay and the pierhead line established by chapter 491 of the Laws of the State of New York of 1884 and approved by the Secretary of War on March 4, 1890.

567 Wherefore the said The City of New York, one of the plaintiffs in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above-entitled cause, to the prejudice of the city of New York, one of the plaintiffs in error, the said judgment of the said United States Circuit Court of Appeals be reversed, annul'ed, and for naught esteemed, unless the defendant in error will assign to the city of New York of the said judgment of the District Court of the United States for the Eastern District of New York the further sum of five hundred and eighty-nine thousand seven hundred and thirty-one dollars and eighty-two cents ($589,731.82) with interest thereon at six per cent (6%) per annum from January 5, 1921, being the portion of said judgment of said District Court which represents compensation awarded for the portions of 61st Street, 62nd Street, and 63rd Street between the high-water mark of the New York Bay and the pierhead line established by chapter 491 of the Laws of the State of New York of 1884 and approved by the Secretary of War on March 4, 1890, or for such further proceedings in said cause as may be determined upon by this honorable court, to the end that justice may be done in the premises.

JOHN P. O'BRIEN,
*Corporation Counsel, Attorney for The City of New York, One of the Plaintiffs in Error.*

United States Circuit of Appeals for the Second Circuit. United States of America and The City of New York, plaintiff in error, vs. George F. Benedict as sole surviving trustee of the trusts created by the last will and testament of Wm. C. Langley, deceased, defendant in error. Assignment of errors of The City of New York. John P. O'Brien, Corporation Counsel, Municipal Building, Borough of Manhattan, New York City.

568 UNITED STATES OF AMERICA,
*Southern District of New York, ss:*

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the fore-

going pages, numbered from 1 to 568, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of United States and City of New York, plaintiffs in error, against George F. Benedict, as sole surviving trustee, etc., defendant in error, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 5th day of May in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the said United States the one hundred and forty-sixth.

[L. S.] WM. PARKIN,
*Clerk.*

569 THE UNITED STATES OF AMERICA, *ss:*

*The President of the United States of America to George F. Benedict, as sole surviving trustee of the trusts created by the last will and testament of William C. Langley, deceased, greeting:*

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States Circuit Court of Appeals for the Second Circuit, wherein the United States of America is plaintiff in error and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Martin T. Manton United States Circuit Judge, this 26th day of April, in the year of our Lord one thousand nine hundred and twenty-two, and of the Independence of the United States the one hundred and forty-sixth.

MANTON,
*United States Circuit Judge.*

United States Circuit Court of Appeals for the Second Circuit. United States of America, plaintiff in error (defendant below), against George F. Benedict, as sole surviving trustee of the trusts created by the last will and testament of William C. Langley, deceased, defendant in error (plaintiff below). Citation. Ralph C. Greene, United States attorney, Eastern District of New York, Room 211, P. O. Building, Brooklyn, New York.

Copy received Apr. 27, 1922. Seibert & Riggs. Seibert & Riggs, Attys. for deft. in error.

United States Circuit Court of Appeals, Second Circuit. Filed Apr. 27, 1922. William Parkin, clerk.

A copy of the within paper has been this day received at the office of the corporation counsel, Apr. 27, 1922. John P. O'Brien, corporation counsel.

United States Circuit Court of Appeals, Second Circuit. Filed Apr. 27, 1922. William Parkin, clerk.

570 UNITED STATES OF AMERICA, *ss:*

*The President of the United States to George F. Benedict, as sole surviving trustee of the trusts created by the last will and testament of William C. Langley, deceased, greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States Circuit Court of Appeals for the Second Circuit, wherein the city of New York is one of the plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against United States of America, one of said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable M. T. Manton, United States circuit judge, this 27th day of April, in the year of our Lord one thousand nine hundred and twenty-two.

Attest:

WM. PARKIN,
*Clerk.*

[SEAL.]

MANTON,
*Circuit Judge.*

United States Circuit Court of Appeals for the Second Circuit. United States of America and The City of New York, plaintiff in error (defendants below), vs. George F. Benedict, as sole surviving trustee of the trust created by the last will and testament of William C. Langley, deceased, defendant in error (plaintiff below). (Original.) Citation on writ of error. John P. O'Brien, corporation counsel, Municipal Building, Borough of Manhattan, New York City.

Due and timely service of a citation on writ of error, of which the within is a copy, is hereby admitted. New York, April 28, 1922. Ralph C. Greene, U. S. Atty.

Copy received. Seibert & Riggs, attorneys for Plf. in error, April 28, 1922.

United States Circuit Court of Appeals, Second Circuit. Filed Apr. 28, 1922. William Parkin, clerk.

Served by P. J. Ryan, date 4/28/22.

(Indorsement on cover:) File No. 28,935. U. S. Circuit Court of Appeals, Second Circuit. Term No. 394. The United States of America and the city of New York, plaintiffs in error, vs. George F. Benedict, as sole surviving trustee of the trusts created by the last will and testament of William C. Langley, deceased. Filed May 17th, 1922. File No. 28,935.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1922

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JAN 2 1923
WM. R. STANSBURY
CLERK

# Supreme Court of the United States

No. 394. October Term—1922.

THE UNITED STATES OF AMERICA AND THE CITY OF NEW YORK,
*Plaintiffs in Error,*

*vs.*

GEORGE F. BENEDICT, as sole surviving Trustee of the trusts created by the Last Will and Testament of William C. Langley, deceased,
*Defendant in Error.*

## BRIEF ON BEHALF OF THE CITY OF NEW YORK, PLAINTIFF IN ERROR.

CHARLES J. NEHRBAS,
EDWARD J. KENNEY, JR.,
*Of Counsel for Plaintiff in Error.*

1922
Stillman Appellate Printing Co.
New York

## SUBJECT INDEX.


| | PAGE |
|---|---|
| Statement of the case | 2-9 |
| Section 10 of the Lever Act | 2 |
| Property requisitioned by President | 2-3 |
| Streets dividing requisitioned property conveyed to The City of New York by deed | 3-4 |
| Determination of board of appraisers | 5 |
| Proceedings in District Court | 6-7 |
| Defendant in error claims title to streets despite the deed | 6 |
| Claim upheld by District Court | 6-7 |
| Proceedings in Circuit Court of Appeals | 7-8 |
| City's claim of title upheld in part (*i. e.*, to the high water line only) | 8 |
| Specification of errors (failure to construe deed as conveying streets out to pierhead line) | 9 |
| Point I—Case properly before this Court for review | 10-11 |
| Point II—Deed conveyed streets to City out to pierhead line | 12-15 |
| Point III—Deed in all respects valid | 16-24 |
| Conveyance within power of trustees | 16-21 |
| Statute authorizing conveyance complied with | 21-24 |
| Conclusion | 24 |

## LIST OF CASES CITED.


| | PAGE |
|---|---|
| City of Cohoes vs. D. & H. C. Co., 134 N. Y., 397 | 22 |
| Driggs vs. Phillips, 103 N. Y., 77 | 21 |
| Matter of Opening 67th Street, 60 How. Pr., 264 | 18 |
| N. Y. C. & H. R. Co. vs. City of Buffalo, 200 N. Y., 113 | 21 |
| Palmer vs. East River Gas Co., 115 App. Div., 677 | 22 |
| Russell vs. Russell, 36 N. Y., 581 | 19 |
| Sholle vs. Sholle, 113 N. Y., 261 | 19 |
| Simmons vs. Crisfield, 197 N. Y., 365 | 18 |
| Smith vs. Bartlett, 180 N. Y., 360 | 12 |
| St. Vincent Asylum vs. City of Troy, 76 N. Y., 108 | 21 |
| Turco vs. Trimboli, 152 App. Div., 431 | 20 |
| United States vs. Pfitsch, 256 U. S., 547 | 11 |
| Welbrock vs. Roddy, 169 App. Div., 251 | 20 |
| Wetmore vs. Porter, 92 N. Y., 76 | 19 |
| Wyman vs. The Mayor, 11 Wend., 486 | 18 |

# Supreme Court of the United States

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| THE UNITED STATES OF AMERICA and THE CITY OF NEW YORK, Plaintiffs in error, against GEORGE F. BENEDICT, as sole surviving Trustee of the trusts created by the Last Will and Testament of William C. Langley, deceased, Defendant in error. | No. 394 October Term, 1922. |

## BRIEF ON BEHALF OF THE CITY OF NEW YORK, PLAINTIFF IN ERROR.

This is a writ of error to the United States Circuit Court of Appeals for the Second Circuit, to review the judgment of that Court made upon a review of the final judgment of the District Court of the United States for the Eastern District of New York.

## Statement of the Case.

This is a suit at law brought under the provisions of the Food and Fuel Act (commonly known as the Lever Act) of August 10, 1917, Section 10 of which provides as follows:

> "That the President is authorized from time to time to requisition foods, feeds, fuels and other supplies necessary to the support of the Army or the maintenance of the Navy or any other public use connected with the common defense, and to requisition or otherwise provide storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as added to said seventy-five per centum will make up such amount as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies." [40 Stat. 279.]

On April 6, 1918, and on May 31, 1918, a large area of real property fronting on New York Bay, in the Borough of Brooklyn, County of Kings, City and State of New York, was requisitioned by

the President of the United States, pursuant to such statute, for the purposes of an army supply base (Transcript of Record, pp. 272-273). Included in the property so taken was a tract of land owned by the defendant in error, and a tract owned by The City of New York. The lands of the defendant in error were divided by 61st, 62d, and 63d Streets. The lands lying within the limits of such streets, from First Avenue to the pierhead line of New York Bay, were also included in the requisitions.

These streets had been laid out across property formerly owned by William C. Langley. After his death, William H. Langley and Charles E. Goodrich, as Trustees under his will, by deed dated April 25, 1899, and recorded in the office of the Register of Kings County (p. 37), conveyed these streets to the City of New York by the following description:

> "All that certain plot of land situate, lying and being in the Borough of Brooklyn, County of Kings and City and State of New York, lying within the boundary lines of Sixty-first Street as laid down on the Commissioners' Map for the laying out of streets and avenues in the towns of the County of Kings, between Second Avenue and the New York Bay.
>
> Also all that plot of land situate, lying and being in the Borough of Brooklyn, lying between the boundary lines of Sixty-second Street as laid down on said Commissioners' Map between Third Avenue and Sixth Ave-

nue and between Second Avenue and the New York Bay.

Also all that plot of land situate, lying and being in said Borough of Brooklyn, lying between the boundary lines of Sixty-third Street from Sixth Avenue to the New York Bay, as said streets and avenues are laid down on said Commissioners' Map."

Photographic copies of the deed will be submitted to the Court upon the argument.

The map referred to in the deed was offered in evidence at page 47, and copies will be furnished to the Court upon the argument. The black lines upon such map are the lines of the "Commissioners' Map for the laying out of streets and avenues in the towns of the County of Kings," also known as the "Town Commissioners' Map of Kings County." The red lines upon the map have since been added. 61st, 62d and 63d Streets, as laid out on the Town Commissioners' Map, extended beyond the high water line of New York Bay and to a line designated as the pier line. This pier line runs approximately parallel with First Avenue at a distance approximately 1,260 feet outshore thereof. The line of high water is only about 300 feet from First Avenue. Outshore of the pier line shown in black, is the pier line shown in red, established by Chapter 491 of the Laws of New York of 1884, and by the Secretary of War on March 4, 1890. The red pier line also runs approximately parallel with First Avenue, at a distance of about 1860 feet therefrom.

The beds of the portions of the three streets between First Avenue and the high water line have been computed to contain 81,120 square feet (p. 309). The portions between the high water line and the pier line shown on the Town Commissioners' Map contain approximately 149,280 square feet, and the portions between the high water line and the pier line approved by the Secretary of War in 1890 contain approximately 253,140 square feet.

The grantors named in the deed to the City had title, at the time of the conveyance, to the beds of the streets from First Avenue to the (red) pier line of 1890 (Concession, p. 48; Finding XIII, pp. 284-285).

After the property had been requisitioned by the President, the defendant in error and The City of New York appeared before a board of appraisers of the War Department, appointed to determine the compensation to be made. The City submitted its deed of the streets, and demanded compensation for their taking, as well as compensation for the taking of its other property, which is not included in the present suit. The board of appraisers made an award (p. 14) to the defendant in error in the sum of $1,796,522.20 for the taking of the premises claimed to be owned by him "excepting thereout approximately 41,580 square feet conveyed to The City of New York by deed dated April 25th, 1899." The number of square feet thus stated is erroneous, and represents only the number of square feet in the bed of 63d Street, between First Avenue and the high water line (Stipulation, pp. 309-310).

The defendant in error, not satisfied with the amount so awarded, accepted, pursuant to the statute, seventy-five per centum thereof, and brought the present suit to recover such further sum as, added to the amount so accepted, would make up the just compensation claimed by him (Complaint, pp. 5-11). The defendant in error also sought to recover compensation for the taking of the streets deeded to the City in 1899, as above set forth. As a result of this claim, an order was entered (p. 15) making The City of New York a party defendant. A supplementary summons (p. 15) was issued, and an amended complaint was served and filed. In the amended complaint it is alleged that the board of appraisers wrongfully refused to allow compensation to the defendant in error for the taking of the streets in question (p. 19).

The City of New York answered, setting up its title to 61st, 62d and 63d Streets, from the westerly side of First Avenue to New York Bay (pp. 29-30).

After the trial in the District Court, the learned District Judge came to the conclusion that the deed of the streets from the Trustees of William C. Langley to the City of New York was void (pp. 32-33). In the formal findings, the Court found that the defendant in error was the owner of the premises described in the complaint, including the streets (pp. 271-272); that the board of appraisers had erred in refusing to award compensation to the defendant in error for the land lying within the streets in question (pp. 273-274);

that the conveyance by the trustees to the City of New York was not such a sale as the trustees had power to make (p. 280); and that The City of New York had no right, title, or interest in the premises or any part thereof at the time of the appropriation (p. 280).

The learned District Judge refused to find that The City of New York was, by virtue of the deed from the trustees, vested with title in fee, impressed with a trust for street uses, of the land within the lines of the streets (p. 284).

Exceptions were duly filed by the City (pp. 290-291).

In order to remove any possible ambiguity as to the outshore limit of the streets in question, which was stated in the City's answer to be "New York Bay" (p. 29), the City moved to amend its answer by striking out the words "New York Bay" and substituting in place thereof the words, "pierhead line established by Chapter 491 of the Laws of the State of New York of 1884, and approved by the Secretary of War on March 4th, 1890." This motion was denied and the City excepted (pp. 269-270). The City then proposed supplementary findings to bring out its contention with respect to the outshore limits of the streets in question (pp. 284-286). The Court found the facts substantially as proposed, but refused to find that the deed from the trustees conveyed the streets to the pierhead line (p. 286).

The City of New York sued out its writ of error, and the case was argued before the United States Circuit Court of Appeals for the Second Circuit.

In the opinion of that Court, written by Judge Hough (pp. 327-334), the conclusion reached was that the deed of the streets was valid and conveyed a good title to the City. It was further held that the District Judge had erred in including in the award to the defendant in error the value of the land within the lines of the streets. It appeared, however, from an examination of the record, that the amount of the District Judge's award was arrived at by multiplying the number of square feet in the area of the property taken by $2. The area of the land within the lines of the streets, between First Avenue and the high water line, had been computed to be 81,120 square feet (pp. 309-310). The Court of Appeals accordingly decided that the judgment, so far as the defendant in error was concerned, was excessive to the extent of $162,240, which amount should have been awarded to The City of New York. The defendant in error was accordingly directed to file an assignment to The City of New York of its just proportion of the judgment, to wit, $162,240, with interest from April 6, 1918, otherwise the judgment to be reversed and a new trial awarded (pp. 333-334). Such assignment was filed (pp. 334-5) and thereupon the judgment of the District Court was affirmed (pp. 335-336).

The City of New York thus succeeded in the Circuit Court of Appeals to the extent of recovering the value of the beds of the streets between First Avenue and the high water line, but was unsuccessful in that it failed to recover the value of the portions of the streets between the high water line and the pier line of 1890.

The City of New York has accordingly sued out its writ of error to bring before this Court the question of its right to compensation for the portions of the beds of the streets in question between the high water line and the pier line approved by the Secretary of War on March 4, 1890.

## Specification of Errors.

The errors relied upon by The City of New York are:

(1) The affirmance by the Circuit Court of Appeals of the judgment of the District Court in the full amount thereof.

(2) The failure of the Circuit Court of Appeals to sustain the assignments of error relating to those portions of 61st, 62d and 63d Streets between the high water line of New York Bay and the pierhead line approved by the Secretary of War on March 4, 1890.

(3) The action of the Circuit Court of Appeals in directing the defendant in error to assign to The City of New York only the sum of $162,240, with interest, and in not directing the defendant in error to assign to The City of New York the further sum of $589,731.82, representing compensation awarded for the portions of the streets between the high water mark and the pierhead line of 1890, with interest thereon from April 6, 1918, to the date of the entry of judgment.

These errors are assigned at pages 340-341.

## POINT I.

**The case is properly before this Court for review.**

We have sued out our writ of error under the provisions of Section 241 of the Judicial Code, which reads as follows:

> "In any case in which the judgment or decree of the circuit court of appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs."
>
> 36 Stat., 1157.

The cases in which the judgment of the Circuit Court of Appeals is final are enumerated in Section 128 of the Judicial Code, which reads as follows:

> "The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district court for Hawaii and the United States district court for Porto Rico, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise pro-

vided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the trade-mark laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

36 Stat. 1133 as amended, 38 Stat., 803.

The case at bar was not brought in the District Court by reason of diversity of citizenship, nor did it arise under the patent laws, the trade-mark laws, the copyright laws, the revenue laws, or the criminal laws, nor is it an admiralty case. It was brought before the District Court pursuant to Section 10 of the Lever Act, set forth at page 2, *supra*.

A judgment of the District Court under Section 10 of the Lever Act is not reviewable by direct writ of error to this Court.

United States vs. Pfitsch, 256 U. S., 547.

The writ of error, in the first instance, must go to the Circuit Court of Appeals.

Idem.

## POINT II.

**The deed conveyed to the City the land within the lines of the streets from First Avenue to the pierhead line.**

At the time of the conveyance in the case at bar, the grantors owned the land within the lines of the streets out to the pierhead line established by Chapter 491 of the Laws of the State of New York of 1884, and approved by the Secretary of War on March 4, 1890, and the Trial Court so found (Finding XIII, pp. 284-285).

The law is well settled that, where a party owning upland and abutting land under water makes a conveyance of the upland, the land under water is presumed to be included, in the absence of an unmistakable intention to exclude it.

In *Smith vs. Bartlett,* 180 N. Y., 360, this principle was held applicable to land under navigable waters in which the tide ebbs and flows. In that case the Court quoted, with approval, the following extract from Devlin on Deeds, Second Edition, Volume 2, Section 1028-a:

> "The natural presumption where a deed conveys land bordering on a stream or highway is, that the grantor means to convey what he owns, and not to reserve a strip of land of no value to him, but the loss of which to the grantee might be productive of great injury. He has power by apt words to reserve what,

and as much as he pleases, or so to frame the language of his conveyance as to limit the land conveyed to the line of the stream or highway, without extending further, and, in all such cases, courts are bound to give effect to his expressed intention. But in the absence of words showing such an intention, it is not presumed that the grantor intended to retain in himself the fee to the street or stream, when he has parted with the adjoining land. Therefore, it may be said to be a universal rule, that a deed giving a stream as a boundary, will convey title to the center of the stream or to low or high water mark, depending upon how far the grantor's title extends. By such a description, the grantor will convey all that he owns, unless a contrary intent appears from the language of the deed. The deed is taken most strongly against the grantor in the application of this rule, and courts will not favor the presumption that he has retained title to the bed of the stream."

180 N. Y., at pp. 365-366.

The Court also quoted the following from Gould on Waters, Third Edition, Section 195:

"When riparian estates are conveyed the owner may reserve the land under water, but the general presumption is that the purchaser's title extends as far as the grantor owns, in both tidal and fresh waters."

Upon the above authorities and others of similar purport, it seems plain that the deed must be construed as conveying the property as far out as the grantors owned, namely, to the pierhead line approved by the Secretary of War in 1890.

It is a matter of common knowledge that the City of New York, in opening streets which extend to navigable waters, always acquires title in fee as far out as the legally established pierhead line. In order to facilitate such practice, the State of New York, in 1897 (two years prior to the deed in question), conveyed to the City the lands under water owned by the State within the projected lines of streets intersecting the shore line as far out as the needs of the City might require.

> Greater New York Charter (Chapter 378 of the Laws of New York of 1897) Section 83.

The needs of the City, thus coinciding with the presumed intention of the grantors, make only one construction of the deed possible.

The defendant in error relies upon the fact that a map was attached to the deed which shows a wavy line at the outer end of the premises granted. It is contended that this was intended to represent the high water line. The line is not so designated, and the language of the deed repels any such suggestion. The premises described are the lands—

> "lying within the boundaries of Sixty-first Street *as laid down on the Commissioners'*

*Map* for the laying out of streets and avenues in towns of the County of Kings between Second Avenue and the New York Bay, * * * lying between the boundary lines of Sixty-second Street *as laid down on said Commissioners' Map* between Third Avenue and Sixth Avenue and between Second Avenue and New York Bay, * * * lying between the boundary lines of Sixty-third Street from Sixth Avenue to the New York Bay *as said streets and avenues are laid down on said Commissioners' Map.*"

The Commissioners' map referred to in the deed was, as heretofore stated, put in evidence. Copies are to be submitted upon the argument. This map shows each of the streets extending *to the pier line.* True, this is not the pier line approved by the Secretary of War in 1890, but it was the only pier line established at the time of the filing of the map.

The language of the deed thus shows conclusively that the premises conveyed were not bounded by the high water line, but by the pierhead line. As the 1890 line had been laid down at the time of the making of the deed (1899) it must be that line to which the conveyance was made. There is no conceivable reason why the grantors should have retained the strips of land under water between the Commissioners' pierhead line and the line of 1890. Under the rule laid down in the authorities above cited, it must be presumed, therefore, that they were included in the conveyance.

## POINT III.

**The deed was within the power of the trustees who executed it, and was in all respects valid and effectual to convey the premises to the City.**

The defendant in error contended below, and will doubtless contend here, that the deed in question is void in its entirety. This contention is based principally upon the language of the power of sale given to the trustee grantors by their testator. It was as follows:

> "I hereby authorize and empower my said executors and trustees and their successor and successors, to sell at their discretion as to the time and terms and at public and private sale, all and every part of my real estate, and to execute and deliver all necessary and proper assurances and conveyances for the same to the respective purchasers thereof" (p. 277).

At the time of the execution and delivery of the deed, Section 992 of the Greater New York Charter (Chapter 378 of the Laws of New York of 1897), provided as follows:

> "Owners may convey to the City.
>
> § 992. The owners of land and of all the estate therein embraced within the lines of any street laid down and shown on the map

or plan of The City of New York and comprising all the land within said lines in an entire block in extent, may, without compensation, and at their own expense, convey all their right, title and interest therein, providing the same shall be free from incumbrances inconsistent with the title to be acquired by the city, to The City of New York, and upon delivery of such conveyances to the corporation counsel of said city, with the money necessary to record such conveyances, and affidavits made by all such owners to the effect that the persons making them, are the owners of the estates in such lands so conveyed by them, respectively, and stating their interests, and that such estates in such lands are free of all incumbrances, except as aforesaid, together with abstracts of title and complete searches, if desired by such corporation counsel, it shall be the duty of such corporation counsel to examine such conveyances and papers, and if such titles shall not be rejected for good cause, by such corporation counsel, he shall cause the said conveyances to be recorded in the office in which conveyances of real estate are recorded in the county in which such lands are located within sixty days after their delivery to him, and file them with the comptroller of such city, and thereupon the City of New York shall become vested with the title to said lands to the same effect and extent as if they had been acquired by a proceeding taken for the

opening of that portion of said street; *after the making and acceptance of such conveyances, no proceedings to open the lands so conveyed shall be taken or maintained, nor shall the lands fronting on that portion of the street so conveyed, and extending to the center of the block on either side of such portion of said street so conveyed, be chargeable with any portion of the expenses of opening the residue* or any portion of the residue of such street, except the due and fair proportion of the awards that may be made for buildings as aforesaid."

Under the broad power of sale given the trustees, they clearly had the right to convey to The City of New York the beds of the streets, the consideration, under the statute, being exemption of the balance of the property from assessment.

*Wyman vs. Mayor,* 11 Wend., 486;
*Matter of opening 67th Street,* 60 How. Pr., 264, cited with approval in
*Simmons vs. Crisfield,* 197 N. Y., 365, 368.

In the *67th Street* case it was held that an executor under an ordinary power of sale might properly dedicate a portion of the testator's real property to street uses, the result being an enhancement in value of the abutting property. Such dedication, of course, amounted to a conveyance of an easement to others, without any specific consideration. In the case at bar, there was a

specific consideration, namely, exemption from assessment. An assessment in a street opening proceeding would include not only the value of the property taken, but also the fees of the commissioners and other expenses of the proceeding. (Greater N. Y. Charter, Chap. 378 of the Laws of New York of 1897, §258 and §980.) All of this was to be saved to the estate by the making of the deed to the City.

Defendant in error relies upon several cases which have construed limited powers of sale, but none of them has any application to the case at bar.

In *Russell vs. Russell*, 36 N. Y., 581, the executors conveyed to one of the legatees a portion of the testator's real estate in payment of a debt due from the testator to the legatee. This was held to be improper on the ground that it was a diversion of a portion of the real property to the enhancement of the personal estate. Debts, of course, are payable in the first instance from the personalty, of which in the case cited there was sufficient to discharge them all. It was clearly improper for the executors to deprive the devisees of the real estate of part of the property coming to them in order that more might go to the legatees of the personalty.

The case of *Sholle vs. Sholle*, 113 N. Y., 261, involves the same proposition as the case of *Russell vs. Russell, supra*, and was decided upon the same ground.

In *Wetmore vs. Porter*, 92 N. Y., 76, no question concerning the power of the trustee was discussed by the Court.

In *Welbrock vs. Roddy,* 169 App. Div., 251, the exercise of the power of sale was approved by the Court.

In *Turco vs. Trimboli,* 152 App. Div., 431, the power was expressly limited to a sale "for cash or on credit, or part cash and part credit." This was held not to authorize an exchange for other property, such exchange not being deemed a sale for cash or credit.

There is nothing in any of the cases relied upon by the defendant in error, or in any other case that we have been able to find, which intimates that it is improper for trustees under a broad general power of sale, "at their discretion as to the time and terms," to convey a portion of the trust estate to the municipality, in order to secure exemption from assessment in proceedings to open streets. Hundreds of such deeds must from time to time have been executed and delivered to The City of New York, and this is the first time that the validity of such a conveyance has been called in question.

The fact that the streets have not been physically opened, and that the land within their lines has remained in the actual possession of the defendant in error does not impair the City's rights.

> "After the fee of the land over which a highway is to be opened is obtained, if the municipality decides that the public interest does not require that the lands be immediately opened as a public highway, and it consequently delays opening the same, it does

not thereby either lose the title to the land or its right to open the same to public use."

*N. Y. C. & H. R. R. Co. vs. City of Buffalo,* 200 N. Y., 113, at page 120.

Nor can title by adverse possession be acquired to property owned in fee by a municipality for street purposes.

*Driggs vs. Phillips,* 103 N. Y., 77;
*St. Vincent's Orphan Asylum vs. City of Troy,* 76 N. Y., 108.

Moreover twenty years did not elapse between the date of the deed (1899) and the date of the appropriation (1918).

It cannot reasonably be contended that the requirements of the statute were not fully met in the conveyance of the streets to the City.

Section 992 of Chapter 378 of the Laws of New York of 1897, quoted *supra,* requires, prior to a conveyance of the beds of streets and the consequent exemption from assessment, that certain conditions be complied with. They are:

1. The streets must have been laid down on the map or plan of The City of New York. The Court found this to be the fact (XIV, p. 285).

2. The party tendering the deed must own all the land within the lines of the street for an entire block in extent. It is conceded that the

grantors in the case at bar owned the land described in the deeds (p. 48, Finding XIII, pp. 284-285), but it is contended by the defendant in error that the portions of the streets between First Avenue and the high water line do not include whole blocks. This is immaterial, as the true construction of the deed carries the streets to the pierhead line (Point II, *supra*) and the Trial Court found that the space between First Avenue and the pierhead line comprised two whole blocks (p. 285).

But the point is not well taken even with respect to the space between First Avenue and the high water line. A block, as the word is used in the statute, means the portion of a street between two intersecting highways. The bay is as much a highway as is a street.

A further complete answer to the contention of the defendant in error is that the question with respect to the conveyance covering an entire block can be raised only by the City, and is waived if the corporation counsel accepts and records the deed. No statute was needed to authorize the conveyance of any portion of the bed of a street to the City, or to authorize the City to accept such conveyance if it desired to do so.

See

City of Cohoes vs. D. & H. C. Co., 134 N. Y., 397, at p. 402;
Palmer vs. East River Gas Co., 115 App. Div., 677, at pp. 680 to 681.

A statute was necessary, however, to *require* the City to accept the cession. The object of the

statute was to relieve a situation due to the reluctance of the City to accept such conveyances. This reluctance was based upon the confusion in levying assessments which would result in cases where part of the street was ceded by the owner and part acquired in condemnation proceedings. With this situation in mind, the Legislature provided that, in cases where the owners tendered a deed comprising all the land in a street for an entire block, "*it shall be the duty* of such corporation counsel to examine such conveyances and papers and if such titles shall not be rejected for good cause by such corporation counsel he *shall* cause the said conveyances to be recorded * * *." This provision gave the property owner an enforcible right which he did not have before. But, even after passage of the act, therewas nothing to prevent the conveyance of less than a block, provided the City was willing to accept it.

3. The statute required an affidavit of title by the owner. This was furnished (Exhibit "AA-2", admitted p. 38; see Finding VIII, p. 283).

4. The statute called for an abstract of title or search. A certificate of the Title Guarantee and Trust Company was furnished (Exhibit "AA-3", admitted at p. 38; see Finding IX, p. 283).

5. The deed was recorded by the corporation counsel in the office of the Register of the County of Kings, and the original was filed with the Comptroller of the City of New York (Finding XI, p. 283).

The attack upon the deed comes with ill grace from the defendant in error, whose predecessors made and executed it with every appearance of good faith. By such attack, it is sought to cloud a title held for many years, in order that more dollars may be extracted from the Government treasury, and that the City may go without compensation. Arguments of greater potency than the quibbles advanced by the defendant in error should be required to accomplish such a purpose.

It is to be noted that the defendant in error has not sought to review the decision of the court below, but, on the contrary, has executed the assignment to the City. This constitutes a virtual admission of the validity of the deed, and of the fact that the lands within the lines of the streets are worth two dollars per square foot.

**The judgment should be modified by requiring defendant in error to assign to the City of New York an additional portion of the judgment recovered against the United States, representing the compensation, with interest, awarded for the portions of the streets between the high water line and the pierhead line, to wit, the sum of $589,731.82.**

New York, January , 1923.

Respectfully submitted,

CHARLES J. NEHRBAS,
EDWARD J. KENNEY, JR.,
Of Counsel.

# INDEX.


| | Page. |
|---|---|
| STATEMENT OF THE CASE | 1 |
| THE BENEDICT CASE | 2 |
| THE SEABOARD AIR LINE CASE | 5 |
| ARGUMENT | 6-30 |
| CONCLUSION | 30 |


## CITATIONS.


| | |
|---|---|
| CASES: | |
| *Bauman* v. *Ross*, 167 U. S. 548 | 7 |
| *Harvey* v. *United States*, 113 U. S. 243 | 10 |
| *Maguire and others* v. *United States*, Dist. Ct. for Conn | 27 |
| *Tillson* v. *United States*, 100 U. S. 43 | 10, 14 |
| *United States* v. *Bayard*, 127 U. S. 251 | 10 |
| *United States* v. *Cress*, 243 U. S. 316 | 30 |
| *United States* v. *Highsmith*, 255 U. S. 170 | 27 |
| *United States* v. *Jones*, 109 U. S. 513 | 7 |
| *United States* v. *Lynah*, 188 U. S. 445 | 30 |
| *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330 | 10, 15 |
| *United States* v. *North Carolina*, 136 U. S. 211 | 10, 12 |
| *United States* v. *Pfitsch*, 256 U. S. 547 | 10 |
| *United States* v. *Rogers*, 255 U. S. 163 | 27 |
| *United States* v. *Sargent*, 162 Fed. 81 | 28 |
| STATUTES: | |
| Lever Act— | |
| Section 10 | 6 |
| Section 12 | 25 |
| Section 16 | 25 |
| Section 25 | 25 |

# In the Supreme Court of the United States

OCTOBER TERM, 1922.

THE UNITED STATES OF AMERICA AND the city of New York, plaintiffs in error,
*v.*
GEORGE F. BENEDICT, AS SOLE SURVIVING trustee of the trusts created by the last will and testament of William C. Langley, deceased. } No. 394.

*IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.*

SEABOARD AIR LINE RAILWAY COMPANY et al., plaintiffs in error,
*v.*
THE UNITED STATES. } No. 407.

*IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.*

## BRIEF FOR THE UNITED STATES.

### STATEMENT OF THE CASE.

These two writs of error raise the question whether interest may be allowed by the district courts upon the amount found by the court to be the value of property

taken by the United States under the Act of August 10, 1917, commonly called the Lever Act, 40 Stat. 276, in cases where the owner refused to accept the award made by the President and brought suit in the district court as authorized by said act.

The *Benedict case*, No. 394, comes from the Circuit Court of Appeals for the Second Circuit, and that court held that interest could be allowed. The decision of that court is reported in 280 Fed. 76, and the United States took the writ of error.

The *Seaboard Air Line Case*, No. 407, comes from the Circuit Court of Appeals for the Fourth Circuit, and that court held that interest could not be allowed. The decision of that court is reported in 280 Fed. 349, and the property owner took the writ of error.

**The Benedict Case (No. 394).**

By this writ of error the United States seeks to review a final judgment of the Circuit Court of Appeals for the Second Circuit affirming, so far as the United States is concerned, a judgment of the District Court of the United States for the Eastern District of New York, which awarded to the defendant, hereinafter called the Langley Estate, the sum of two million, four hundred thirty-nine thousand four hundred seventy-four dollars and seventy-seven cents ($2,439,474.77), which sum was fixed as the amount to be paid by the United States for land taken by the United States for war purposes under the Lever Act of August 10, 1917, 40 Stat. 276. This award included the sum of $358,226.82 by way of interest

upon the value of the property taken from the time of the taking down to the date of the decision (19th and 20th findings of fact, pages 275 and 276). The only point raised by the United States upon this writ of error is the power of the court to allow this interest.

The property consisted of land—both upland and land under water—in the County of Kings, City of New York, and was taken by the United States in April and May, 1918. In accordance with the Lever Act the President appointed a commission for the purpose of ascertaining and paying a just compensation for what had been taken. This commission made its award on May 2, 1919, and determined that the just compensation was $1,796,522.20 with interest at five per cent (5%) from May 1, 1918, to date of payment. The award was based upon a valuation of $1.10 a square foot for the property. The owners refusing to accept this award, the United States, on July 11, 1919, paid them 75% thereof, $1,347,396.65, with interest to that date and received a deed of the property. This suit was then brought.

In the year 1899 the Langley Estate had deeded to the City of New York so much of the land as was necessary to continue through the Langley property certain streets. Upon motion of the United States, which was originally the sole defendant, the District Court ordered that the City be brought in as a party defendant. This was done, the City appeared and answered, asserting title in itself in the said streets and in an area of 81,120 square feet. The trial court

determined that the fair and reasonable value of the property which the United States had taken was at the time of taking, $3,428,644, or at the rate of $2 per square foot, and entered judgment for that amount with interest from the date of taking, after making proper allowance for what had already been paid. It also found that the value was the same whether or not the City of New York held title to the lands within the streets hereinbefore mentioned, but that the conveyance from the Langley Estate to the City was void, wherefore title to the entire property was in the Langley Estate, and to it should be awarded the entire recovery (p. 329). To that judgment both the United States and the City of New York took writs of error. The Circuit Court of Appeals affirmed the judgment in so far as the writ taken by the United States was concerned but held that the court below had been in error with respect to the claim of the City and held that the City was entitled to a portion of the award represented by 81,120 square feet of land at $2 per foot, or $160,240, with interest thereon at six per cent (6%), from April 6, 1918. Inasmuch as the error was capable of correction by computation only, that court did not order a reversal but directed the Langley Estate to assign to the City of New York its just proportion of the judgment, and upon the filing of such an assignment the judgment was affirmed (p. 334). Whereupon writs of error were taken by the United States and by the City of New York, the claim of the United States being that no interest should be awarded against it, and the claim

of the State of New York being that the proportion of the award given it by the Circuit Court of Appeals was inadequate and should have been the further sum of $589,731.82 with interest. With the controversy between the City of New York and the defendant in error the United States has no concern.

**The Seaboard Air Line Case (No. 407).**

This writ of error is to the Circuit Court of Appeals for the Fourth Circuit.

The plaintiff in error, Seaboard Air Line Railway Company, was the owner of a certain tract of land containing 2.6 acres in the County of Charleston, South Carolina, subject to the lien of a mortgage to the other plaintiffs in error, Guaranty Trust Company and William C. Cox. On or about May 23, 1919, the President, under the authority of the Lever Act, requisitioned the premises. Thereafter the President, through the War Department Board of Appraisers, determined that the compensation to be paid for the premises was the sum of two hundred sixty-five dollars and eighty cents ($265.80) with interest thereon at the rate of 7% per annum from May 23, 1919. That amount being unsatisfactory, the plaintiffs in error brought suit in the United States District Court for the Eastern District of South Carolina. The case came on to be tried on the 3d day of May, 1921, and the following question was submitted to the jury for determination: "What, on May 23, 1919, was the fair and reasonable value which would constitute a just compensation to be paid for the taking

for public purposes of the lands mentioned and described in the petition herein" (P. 8.) The jury found the sum of $6,000 to be the answer to this question. Upon that verdict a judgment was entered for that amount, to which was added by special direction of the court a provision for interest upon that sum from the 23d day of May, 1919, at the rate of seven per cent. (7%) per annum, the statutory rate in South Carolina. The United States took the case by writ of error to the Court of Appeals for the Fourth Circuit, where the only point urged or considered was the power of the court to award interest upon the amount found by the jury to be the value of the property taken. That court held that the court below had erred in awarding interest and entered judgment reversing the judgment of the District Court and remanding the case with instructions to enter a judgment for the property owners for $6,000 without interest (p. 31), to which judgment the writ of error now before this court was taken.

## ARGUMENT.

**Interest upon the amount found to be the value of property taken for a public use, pursuant to the Lever Act, can not be awarded against the United States.**

Section 10 of the Lever Act of August 10, 1917, 40 Stat. 276, is as follows, so far as is pertinent:

> SEC. 10. That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the

> Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amounts as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies. * * *

Under the Constitution, when private property is taken for public use, no particular method for ascertaining the just compensation to which the owner is entitled is necessary. All that is required is that it be conducted in some fair and just manner with opportunity for the owner to present evidence and be heard. *Bauman* v. *Ross*, 167 U. S. 548; *United States* v. *Jones*, 109 U. S. 513.

In the case of *United States* v. *Jones*, 109 U. S. 513, this court, by Mr. Justice Field, said:

> There is, in this position, an assumption that the ascertainment of the amount of compensation to be made is an essential element of the power of appropriation; but such is not the case. The power to take private property

for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of the sovereignty and, as said in *Boom Co.* v. *Patterson*, requires no constitutional recognition. 98 U. S. 406 (XXV, 208). The provision found in the 5th Amendment to the Federal Constitution, and in the Constitutions of the several States, for just compensation for the property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised. It is undoubtedly true that the power of appropriating private property to public uses vested in the General Government—its right of eminent domain, which Vattel defines to be the right of disposing, in case of necessity and for the public safety, of all the wealth of the country—can not be transferred to a State any more than its other sovereign attributes; and that, when the use to which the property taken is applied is public, the propriety or expediency of the appropriation can not be called in question by any other authority. But there is no reason why the compensation to be made may not be ascertained by any appropriate tribunal capable of estimating the value of the property. There is nothing in the nature of the matter to be determined which calls for the establishment of any special tribunal by the appropriating power.

The proceeding for the ascertainment of the value of the property and consequent compensation to be made, is merely an inquisition

> to establish a particular fact as a preliminary to the actual taking; and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon.

Under the Lever Act, two methods were provided, and the property owner had his choice.

First, the President was directed to ascertain and pay it. This was direct, sure, and speedy, and if the property owner accepted all questions of interest or legal technicalities would be obviated.

Second, if the owner was unwilling to accept the President's award, he could take seventy-five per cent (75%) of it and sue for the balance deemed by him to be proper in order to make the award adequate. But this suit must be in the courts which the United States had empowered to decide claims against it, and we think it is obvious that such a suit must be regarded as an action upon the contract which the United States had made in the Act itself to pay just compensation.

When, therefore, the property owner declined to accept the President's award, and elected to sue, he must have realized that his suit would be subject to the delays incident to all litigation, and to the well-established principles governing such suits and the well-defined limitations which the United States had

fixed with respect to its liability. One of these limitations which had become thoroughly well settled was that interest is never recoverable on claims against the Government, in the absence of a statutory enactment, or of an express contract for the payment thereof.

The jurisdiction granted to the district courts under this section is to be exercised in accordance with the law governing the usual proceeding of the district court in actions of law for money compensation. *United States* v. *Pfitsch*, 256 U. S. 547. The act itself makes no provision for the payment of interest or for any special form of procedure or measure of damages, nor does it repeal or modify the provisions of sections 1090 and 1091 of the Revised Statutes relative to the allowance of interest on claims against the United States.

Interest, therefore, can not be allowed.

*Tillson* v. *United States*, 100 U. S. 43.
*Harvey* v. *United States*, 113 U. S. 243.
*United States* v. *Bayard*, 127 U. S. 251.
*United States* v. *North Carolina*, 136 U. S. 211.
*United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330.

In *United States* v. *Bayard*, 127 U. S. 251, the principle was carried to the extent of holding that the United States could not be required even to pay over interest which it had actually collected upon funds of the claimant while in its possession. That case arose out of claims against Spain, settled by the

Spanish American Claims Commission pursuant to agreement between Spain and the United States. One Angarica filed a claim before the commission, which decided in his favor, and the full amount of the award was paid to the Secretary of State of the United States. The Secretary of State paid to the claimant the entire amount except five per cent (5%), which he retained until the Government of Spain should make provision for paying the expenses of the commission. Of the amount retained, so much as could be utilized for the purpose was invested in securities of the United States. Subsequently the amount retained was paid to the claimant, but the interest or income which had been earned by the investment thereof was not paid. This court held that a claim for this money, made against the Secretary of State, was a claim against the Government of the United States, and that the Government was not liable for the interest. This court said, Mr. Justice Blatchford delivering the opinion (p. 259):

> If there was any unlawful withholding from the petitioner of the $41,129.74, the money was withheld by the Government of the United States, acting through the Secretary of State, and any claim of the petitioner, based upon an unlawful withholding, was a claim against the Government of the United States. That claim, in the present controversy, assumes the shape of a claim for the increment or income alleged to have been actually received by the United States from the investment of the money for the time it was withheld), but

> the claim in that respect is not different in character from what it would have been if, instead of being a claim for increment or income actually received by the United States, it were a claim for interest generally, or for increment or income which the United States would or might have received by the exercise of proper care in the investment of the money.
>
> The case, therefore, falls within the well-settled principle that the United States are not liable to pay interest on claims against them in the absence of express statutory provision to that effect. It has been established as a general rule, in the practice of the Government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private Acts of relief, passed by Congress on special application. The only recognized exceptions are where the Government stipulates to pay interest and where interest is given expressly by an Act of Congress, either by the name of interest or by that of damages.

In *United States* v. *North Carolina*, 136 U. S. 211, this court applied the same rule in favor of the State of North Carolina and against the United States—the rule that a sovereign can only be required to pay such interest as its legislature has specifically authorized. That was an action brought in this court by the United States against the State of North Carolina upon 137 bonds of the State. When the bonds became due, payment was demanded and

refused by the State. Afterwards, however, the State paid the bonds, together with all interest accrued thereon to the date of maturity; but the United States contended that it was entitled to recover interest upon the principal of the bonds after their maturity to the date of payment, while the State contended that there was no liability for interest after their maturity and therefore that payment had been made in full. The bonds themselves contained a provision carrying interest from the date of the bonds "until the principal be paid." This court, however, sustained the contention of the State of North Carolina and held that, in view of the statute under which the bonds were issued, the provision in the bond purporting to carry interest beyond the date of maturity was not enforcible. Mr. Justice Gray, delivering the opinion of the court, said (pp. 216 and 221):

> Interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money or property, or of compensation, to which the plaintiff is entitled; and, as has been settled on grounds of public convenience, is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an Act of its Legislature, or by a lawful contract of its executive officers. *United States* v. *Sherman*, 98 U. S. 565; *United States* v. *Bayard*, 127 U. S. 251, 260, and authorities there collected; *Re Gosman*, L. R. 17 Ch. Div. 771. * * *

> In the light of the provisions of this statute, the agreement in the bonds sued on, that the principal sum shall be "redeemable in good and lawful money" at the place and day therein designated, must be deemed equivalent to an agreement that they shall be payable on that day; and if the further provision by which interest is payable half yearly "from the date of this bond and until the principal be paid, on surrendering the proper coupons hereto annexed," could, upon the face of the bonds and without regard to the laws under which they were issued, be sonstrued to include interest after the date at which the principal is payable, and for which interest there were no coupons to be surrendered, it can not be allowed such an effect, because the State of North Carolina has never authorized its officers to incur any such obligation in its behalf.

In the case of *Tillson* v. *United States*, 100 U. S. 43, Congress had referred to the court of claims to investigate "and ascertain the amount equitably due as damages for alleged breach of contract," and the question arose whether by the use of the word "equitably" it was not intended by the act that interest should be allowed. This court, speaking by Chief Justice Waite, said (p. 46):

> But if Congress had desired to grant such authority it would have been easy to have said so in express terms, and because it did not say so we are led irresistibly to the conclusion that it did not intend to give any such power.

These cases illustrate the inflexible character of the rule. No equitable consideration can be allowed to modify it. Even though the United States has actually collected interest, it can not be required to pay it over, and the United States itself is bound by the rule when it sues a sovereign State upon its bond, even when interest is nominated in the bond.

This whole question, and all the authorities were exhaustively reviewed by Mr. Justice Brandeis in delivering the opinion of the Court in the case of *United States* v. *North American Transportation and Trading Company*, 253 U. S. 330. That action was brought to recover the value of a placer mining camp situated on the public land near Nome, Alaska, which was alleged to have been taken by the Government on December 8, 1900, and also compensation for use and occupation thereof after that date. It appeared that about July 1, 1900, General Randall, commanding the Department of Alaska, took possession, as a site for an army post, of a large site of public land which included a mining claim. The company yielded possession of the part occupied by it, "being unable to withstand his authority," but at the same time demanded compensation, which General Randall promised would be paid. Thereafter, he recommended the use of the site for an army post to the Secretary of War, and pursuant to this recommendation the President, on December 8, 1900, issued an order by which the tract was reserved from sale and set aside for military purposes, and on December 20, 1900, the Secretary of War announced

it as a public reservation under the control of the War Department. The tract was used as an army post continuously since possession was taken by General Randall. The Government contended that the cause of action, if any, had accrued more than six years prior to the commencement of the suit. The court of claims found that the company's property was taken within the six years—that is, on December 8, 1900—and that its then reasonable value was $23,800. It entered judgment for that amount. Both parties appealed, the Government on the ground that the right of recovery, if any, was barred, the company on the ground that no compensation was allowed for the time, use and occupation between the entry of taking and the date of judgment. This court held "when the Government, without instituting condemnation proceedings, appropriates for a public use under legislative authority private property to which it asserts no title, it impliedly promises to pay therefor," and that the taking of the plaintiff's property did not take place until power to do so was exercised by the Secretary of War, and the plaintiff's cause of action, therefore, did not arise until after December 7, 1900, and was not barred by the statute of limitations. With respect to the matter of compensation for use and occupation from the date of taking to the date of judgment, the court said:

> The company contends that it should receive, in addition to the value of the property at the time of the taking, compensation for

the occupation and use thereof from that date to the date of the judgment—a period of nearly twenty years during which the company was deprived of the use of its property. This contention is based upon the decisions of many state courts that, upon the taking of private property for public uses, the owner is entitled to recover, besides its value at the time of the taking, interest thereon from the date on which he was deprived of its use to the date of payment. In a number of cases in the lower federal courts also the landowner has been permitted to recover interest from the time of the taking; but in each such case a statute had provided in some form that the condemnation should be conducted according to the laws of the State in which the land was situated—and under the law of the State interest was recoverable. *United States* v. *Engeman*, 46 Fed. Rep. 898; *Town of Hingham* v. *United States*, 161 Fed. Rep. 295, 300; *United States* v. *Sargent*, 162 Fed. Rep. 81; *United States* v. *First National Bank*, 250 Fed. Rep. 299; *United States* v. *Rogers*, 257 Fed. Rep. 397; *United States* v. *Highsmith*, 257 Fed. Rep. 401. These conformity provisions which relate only to the laws of States, can have no application to lands in Alaska; nor can they affect proceedings brought in the Court of Claims.

The right to bring this suit against the United States in the Court of Claims is not founded upon the Fifth Amendment, *Schillinger* v. *United States*, 155 U. S. 163, 168; *Basso* v. *United States*, 239 U. S. 602, but

upon the existence of an implied contract entered into by the United States. *Langford* v. *United States*, 101 U. S. 341; *Bigby* v. *United States*, 188 U. S. 400; *Tempel* v. *United States*, 248 U. S. 121, 129; *United States* v. *Great Falls Manufacturing Co., supra; United States* v. *Lynch, supra*. And the contract which is implied is to pay the value of property as of the date of the taking. *Bauman* v. *Ross*, 167 U. S. 548, 587; *United States* v. *Honolulu Plantation Co.*, 122 Fed. Rep. 581, 585; *Burt* v. *Merchants' Insurance Co.*, 115 Massachusetts, 1, 14. Interest may not be added because § 177 of the Judicial Code, re-enacting § 1091 of the Revised Statutes, declares that: "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest." *Tillson* v. *United States*, 100 U. S. 43. Congress, in thus denying to the court power to award interest, adopted the common-law rule that delay or default in payment (upon which, in the absence of express agreement, the right to recover interests rests) cannot be attributed to the sovereign. *United States* v. *North Carolina*, 136 U. S. 211, 216. That rule had theretofore been uniformly applied in our executive departments except where statutes provided otherwise. *United States* v. *Sherman*, 98 U. S. 565, 567–8. So rigorously is the rule applied, that, in the adjustment of mutual claims between an individual and the Government, the latter has been held entitled to interest on its credits

although relieved from the payment of interest on the charges against it. *United States* v. *Verdier*, 164 U. S. 213, 218–219. This denial of interest, like the refusal to tax costs against the United States in favor of the prevailing party, *Stanley* v. *Schwalby*, 162 U. S. 255, 272; *Pine River Logging Co.* v. *United States*, 186 U. S. 279, 296, and the refusal to hold the United States liable for torts committed by its officers and agents in the ordinary course of business, *Crozier* v. *Krupp*, 224 U. S. 290, are hardships from which, with rare exceptions, *William Cramp & Sons Co.* v. *Curtis Turbine Co.*, 246 U. S. 28, 40–41, Congress has been unwilling to relieve those who either voluntarily deal with the Government or are otherwise affected by its acts.

The company argues that interest is allowed in condemnation proceedings, not *qua* interest for default or delay in paying the value, but as the measure of compensation for the use and occupation during the period which precedes the passing of the title (see *Klages* v. *Philadelphia & Reading Terminal Co.*, 160 Pa. St. 386); and that collection of an amount, measured by interest, is not prohibited either by the statute limiting the powers of the Court of Claims or by the common-law rule which exempts the sovereign from liability to pay interest. *United States* v. *New York*, 160 U. S. 598, 622. This may be the theory on which interest should be allowed in compensation proceedings; and it may be that, even in the absence of the conformity provision referred to above, interest could be collected

as a part of the just compensation in condemnation proceedings brought by the Government. For, as suggested in *United States* v. *Sargent, supra*, such a proceeding is not a suit by the landowner to collect a claim against the United States, but an adversary proceeding in which the owner is the defendant and which the Government institutes in order to secure title to land. *Mason City & Fort Dodge R. R. Co.* v. *Boynton*, 204 U. S. 570. On the other hand, this suit brought in the Court of Claims is a very different proceeding. It is an action of contract to recover money which the United States is assumed to have promised to pay; and the assumed promise was to pay the value at the time of the taking. The suit is in effect an action on two counts—one for the value of the mining claim, the other for use and occupation after December 8, 1900, at the rate of $7,500 per year. If the company had brought the suit immediately after the taking, it clearly could not have recovered any amount for use and occupation; for a plaintiff suing in contract can recover only on a cause of action existing at the time the suit was brought. The loss to the company of the use of $23,800, which is found to be the value of the mining claim when it was taken nearly twenty years ago, must be deemed to be due, in part, to its delay in instituting the suit, and, in part, to the delays of litigation for which it may have been largely responsible. But as, in either event, the loss of the use of the money results from the failure to collect sooner a claim held

to have accrued when the company's property was taken, that which the company seeks to recover is, in substance, interest, and that Congress has denied to the Court of Claims power to allow.

On this branch of the case the Circuit Court of Appeals for the Second Circuit said in the *Benedict case* (p. 330):

> As to interest, it is to be noted that the acquisition of property under the Lever Act is only a summary species of what are commonly called condemnation proceedings. The justification for any condemnation is the necessity of taking something from a private person for a public use; and the justification for the summary procedure of the act under consideration is the overwhelming necessity for speed under the dreadful pressure of war. But whether the taking be by the familiar condemnation of peace or by the strong arm of a nation at war, the obligation upon the taker is always that recognized in this very statute, viz: to make "just compensation" to the owner. (Monongahela, etc., Co. vs. United States, 148 U. S. 312); and see a general consideration of the matter in National City Bank vs. United States, 275 Fed. 855.
>
> It is certain that the national immunity from payment of interest does not extend to condemnation proceedings. (United States vs. Rogers, 257 Fed. 397; United States vs. Highsmith, 257 Fed. 401, affirmed U. S. S. C., Feb. 28, 1921.)
>
> Since, therefore, just compensation by definition includes interest (Co. Agency, etc., Co. vs.

> American, etc., Co., 258 Fed. 363, p. 369), and this statutory method of arriving at compensation is analogous to condemnation proceedings, we are of opinion that the statutory rate prevailing in New York was rightfully allowed.

The Circuit Court of Appeals for the Fourth Circuit in the *Seaboard Air Line case* gave much more extended consideration to the question and concluded that the rule affirmed in the *North American Transportation & Trading Company case*, 253 U. S. 330, should be followed, and very carefully distinguished that case from the *Rogers case*, 255 U. S. 163. Its opinion is found in the record, pages 14 *et seq.* That court said (R. p. 17):

> In the *Rogers case*, Mr. Justice Day cited *United States* v. *North American Transportation Co.*, 253 Fed. 333, 334, 335, 336, and 337, a suit in its essential features like the one here, save that the latter came from the Court of Claims, and nearly twenty years had elapsed between the taking of the property, and the rendition of the judgment. In the last named case, Mr. Justice Brandeis most comprehensively reviews the authorities bearing on the entire subject, from which it will readily be seen that irrespective of what may be done in condemnation proceedings, brought by the Government against a citizen, interest will not be allowed where the government is being sued. This case would seem to remove all doubt on this generally accepted well settled question, and shows that the Government, entirely regardless of what may be said of the

injustice of its position, has hitherto consistently held to its right as at common law, not to be charged with the consequences of loss arising from delays, even if hardships ensue. The result in this respect, is similar to the refusal to allow costs to be taxed against the government, or to be held responsible for the tortious acts of its agents. These conditions necessarily arise in dealing with the sovereign and for which there is no redress.

In discussing the *Rogers case* that court continued (p. 19):

> The court based its ruling in this case upon the decision of *United States* v. *Rogers, supra,* 255 U. S. 163, a condemnation proceeding, and it is earnestly insisted, as it is necessary to do, in order to bring this case within the ruling in that case, that this is virtually a condemnation proceeding. Nothing could be further from the fact, as viewed by the court. What is, and what is not a condemnation proceeding, can hardly be the subject of serious discussion from a legal standpoint. It is one in which the Government in the exercise of its power of eminent domain, one of its most important requisites of sovereignty, institutes its suit against the citizen to acquire title to property, upon the awarding of just compensation for what is proposed to be taken. The Government is the actor, the mover. The citizen is the defendant, brought in involuntarily, for the purpose of having taken from him property belonging to him, upon compensation being made therefor. Upon the lawful conclusion

of such proceeding, and payment of the amount awarded for the property taken, title thereto vests in the government. In such proceedings, especially where conducted under the conformity act in states in which interest is allowed on condemnation awards, interest may, in some instances, have been awarded against the government; but the decision in the case of *United States* v. *Rogers, supra*, 255 U. S. 163, is believed to be the first and only case in which it has been suggested that interest could be awarded independent of such statute, if the court meant to so state, which is doubtful, it merely saying on the contrary, that it was not so bound because of the existence of the State statute, but nevertheless thought it a convenient and fair method of ascertaining the sum to which the owner of the land was entitled. The vital point in that case was that there was a state statute allowing interest. The district court and the circuit court of appeals followed the same in making the allowance of interest, which action the Supreme Court affirmed. As before shown, in that case the Supreme Court expressly recognized the doctrine of the disallowance of interest against the government, and it was careful to distinguish between that case, and that of *United States* v. *North American Transportation Co.*, 253 Fed. 330, supra, which we think is conclusive of this case.

The court held that the present case was in no sense a condemnation proceeding. Congress had authorized the President to requisition property and

pay just compensation for the same, and in case of dissatisfaction the owner was to receive at once seventy-five per cent (75%) of the award and was given permission to sue in the United States District Court for the rest of it. It held that "such action is but a plain and simple suit at law, to recover from the government upon an implied contract to pay for property lawfully taken but not paid for." The court then reviewed the other sections of the Lever Act:

> A review of other sections of the Lever Act, authorizing the requisition of property, will give added strength to the views herein expressed.
>
> Section 12 relates to factories, mines, and pipe lines; section 16 to distilled spirits, and sec. 25 to coal or coke mines or businesses. Each of these three sections provides in identical terms that a person dissatisfied with the President's award, shall be entitled to sue the United States, but each section makes provision for suit against the United States to recover just compensation, in terms materially different from those of sec. 10, that is to say, these three sections provide for suits (sec. 145, Jud. Code) in the Court of Claims where the amount in controversy exceeds the sum of $10,000.00, and in the district courts (sec. 24, para. 20, Jud. Code), concurrent with the Court of Claims, where the amount involved is less than $10,000. The Court of Claims is inhibited from awarding interest prior to the time of the rendition of the judgment, unless the same be expressly stipulated for (Sec. 177, Jud. Code), and a district court

> sitting as a court of claims, at least by analogy, has no greater or other power. It can hardly be conceived that Congress in making provision for payment of property requisitioned by the Government, under the same act, meant to deny interest to claimants under some sections of the law, and leave it open to courts to allow the same on awards under other provisions thereof.

The court concluded that it had no discretion in allowing or withholding interest, nor could it be influenced by mere equitable consideration of what might appear in the particular case to be just, and said (p. 21):

> It may not substitute its judgment for that of Congress, and it should be slow to assume that Congress did not act advisedly and wisely in foreseeing that during a great war, and the period following its conclusion, all sorts and kinds of claims would have to be met and adjusted, necessarily consuming much time, and almost inevitably involving heavy loss to the government. Under these conditions, Congress rightfully refused to impose upon the Government the further burden of paying interest on claims, pending delays incident to such contests. Indeed, all claim of injustice on the part of the Government is silenced, when it undertook voluntarily the payment in advance of seventy-five per cent of its award, on account of such claims.

This same view was taken by the District Court for the District of Connecticut in four cases decided

in December, 1921, and not reported. They were entitled *Maguire* v. *United States*, *Weibe* v. *United States*, *Sekres* v. *United States*, and *Heil* v. *United States*. In its opinion that court said:

> Counsel for claimants fails to distinguish between cases where the United States, as plaintiff, has instituted condemnation proceedings to obtain possession of property, and cases where just compensation must be awarded as a condition precedent which may include the addition of interest when so provided by the laws of the state within which the land is situated, and cases like the instant cases where the owners of the property have been awarded compensation under the exercise of the war powers of the Government and the failure of the owners to receive the entire amount awarded is because they elected to bring suit to recover what they alleged to be the value of their property. In the latter cases the failure of the property owners to receive the amount awarded has been due to their refusal to accept the amount awarded, so that the delay in the receipt of the entire amount of damages awarded is due, partly if not wholly, to the action and conduct of the property owners.

The *Rogers* and *Highsmith cases* were both condemnation proceedings to acquire real estate for Government uses and were regulated by the Act of August 1, 1888, 25 Stat. 357. Section 2 of this act provides that the practice, pleadings, forms, and modes of proceeding in causes arising under the provisions

and the date of the rendition of judgment. In this connection attention is invited to a large number of so-called overflow cases instituted in the Court of Claims and the United States District Courts under the provisions of the Tucker Act to receive just compensation for land taken by the United States as a result of overflow consequent upon the construction of locks and dams, starting with the case of *United States* v. *Lynah*, 188 U. S. 445, and ending with the case of *United States* v. *Cress*, 243 U. S. 316. It is to be noted that the only interest paid plaintiffs in the hundreds of suits decided during that period was the statutory interest at 4 per cent per annum allowed on judgments of the circuit and district courts (but not those of the Court of Claims) from the date of the rendition of same to the date of payment, as provided by Section 10 of the Tucker Act (24 Stat. L. 505).

## CONCLUSION.

The question seems to narrow itself to this: Is the *Rogers* case to be understood as governing cases arising under the Lever Act, or does the rule which has been followed for years, and which was affirmed in the *North American Trans. & Trading Co.* Case, apply, as is claimed by the Government.

We can add but little to what was said by the court below in the *Seaboard Air Line case*. The distinction between condemnation proceedings under statutes containing "conformity provisions" and suits to recover upon contract express or implied has been clearly pointed out. These cases would seem to fall

within the latter class both in form and in fact. When Congress empowered the President to take property, and authorized him to "ascertain and pay a just compensation therefor," it might have made his determination or that of his Commissioners final. He did not do so, however, but gave the owner the right to reject the President's award, receive 75%, and sue upon contract for a further amount. If, in addition, Congress intended to confer upon the suitor exemption from the settled rule governing such suits, that intention must be found by implication. It is not found in the language. Is it not more reasonable to think that Congress, when it gave the additional right, understood that he who availed himself of it must bear the burdens well known to be incidental thereto?

For these reasons the judgment in No. 394 should be reversed in so far as it awards interest against the United States, and the judgment in No. 407 should be affirmed.

JAMES M. BECK,
*Solicitor General.*
ALFRED A. WHEAT,
*Special Assistant to the Attorney General.*
JANUARY, 1923.

○

of the act shall conform to the practice, pleadings, forms, and proceedings existing at the time in like causes in the courts of record in the State within which such circuit or district courts are held. In fixing the compensation the District Court and the Circuit Court of Appeals in affirming the judgment followed the New Mexico statute fixing the rate of interest at 6%. In doing this the Circuit Court of Appeals followed the provisions of the condemnation statute and also the decision in the case of *United States* v. *Sargent*, 162 Fed. Rep. 81, wherein the laws of Minnesota were followed where land was appropriated in that State. Mr. Justice Day recognized the immunity of the Government from liability for interest on claims against it and distinguishes claims of that nature from proceedings brought by the Government and says, at page 169:

> It is unquestionably true that the United States, upon claims made against it, can not, in the absence of a statute to that end, be subjected to the payment of interest. *Angarica* v. *Bayard*, 127 U. S. 251, 260; United States *v. North Carolina*, 136 U. S. 211, 216, cited and approved in *National Volunteer Home* v. *Parrish*, 229 U. S. 494, 496. In the present case the landowners did not sue upon a claim against the Government, as was the fact in *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330.

The case of *United States* v. *Sargent*, 162 Fed. Rep. 81, also recognized as settled the immunity of the Government for the payment of interest on claims,

but held that a proceeding instituted by the United States for the condemnation of land for public use is not one to collect an account or claim but an adversary proceeding instituted by the Government against landowners for the taking thereof. In its opinion the Court said:

> It is well settled that, in the absence of a stipulation to pay interest or a statute allowing interest, none can be recovered against the United States upon unpaid accounts or claims. * * * It is upon or in analogy with this principle that the United States contends that interest upon the amount of the award in this case should not have been allowed. We are unable to agree with this contention. There is a great difference between the assertion of a claim or account against the United States by a person who possesses it and a proceeding of this kind instituted by the United States. This proceeding, instead of one to collect an account or claim against the United States, is an adversary proceeding instituted by the United States against owners of land to take it from them. The landowners are not plaintiffs prosecuting claims, but defendants resisting a proceeding to deprive them of what is theirs until a condition precedent is fulfilled. * * * The exercise of the right of eminent domain is a prerogative of sovereignty in this country, but it is subject to the condition imposed by the Constitution of paying "just compensation therefor."

FILED
JAN 22 1923
WM. R. STANSBU
CLER

No. 394

# In the Supreme Court of the United States

OCTOBER TERM, 1922.

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THE UNITED STATES OF AMERICA and CITY OF NEW YORK, PLAINTIFFS IN ERROR.

*v.*

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF THE TRUST CREATED BY THE LAST WILL AND TESTAMENT OF WILLIAM C. LANGLEY, DECEASED.

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*IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.*

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## BRIEF FOR DEFENDANT-IN-ERROR

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WILLIAM H. SEIBERT,
ROYAL E. T. RIGGS,
*Of Counsel.*

LODER PRINTING COMPANY, INC NEW YORK

# INDEX


| | PAGE |
|---|---|
| Questions presented for determination | 1 |
| Statement of case between plaintiff and United States | 2 |
| Statement of case between plaintiff and City of New York | 4 |
| Decision of the Circuit Court of Appeals | 7 |
| Outline of the argument | 8 |
| ARGUMENT | |
| I. The only question between plaintiff and the United States is the right to interest and the assignments of error do not present that question for review | 10 |
| II. Just compensation must include interest upon the value of the property at the time of the taking from the dates of the actual appropriation thereof to the date of payment therefor | 11 |
| (1) The trial court found as a fact that interest must be included to make just compensation | 12 |
| (2) The United States has conceded that interest is a necessary part of just compensation | 14 |
| (3) § 177 Judicial Code prohibiting the allowance of interest does not apply | 15 |
| (4) This action is merely one step in a proceeding in eminent domain in which just compensation is the issue and ultimate object | 16 |
| (5) The obligation to make just compensation is the same whether the government institutes the court proceedings or forces the property owner to do so | 25 |
| (6) Just compensation by definition includes interest from the time of appropriation to the date of payment | 30 |

PAGE

(7) The requirement as to just compensation will not be satisfied unless interest be paid on the judgment itself..... 32

III. The Circuit Court of Appeals erred in requiring the plaintiff to execute and file an assignment of $162,240 of the judgment to the City of New York because..... 33

(a) The City had stipulated on the trial that it was entitled to no relief in this action 34

(b) The plaintiff was entitled to the judgment even if the title to the streets was in the City ..... 37

(c) Title to the disputed streets was in the plaintiff ..... 42

IV. The City's assignments of error presented no claim in the court below to any part of judgment, and the action of that court in ordering the assignment was a plain error which may be remedied in this court..... 54

V. The deed from the trustees of the Langley Estate if valid conveyed the property with 61st, 62nd and 63rd Streets from Second Avenue only to "the New York Bay" and terminated at high water mark..... 56

(1) The City cannot claim that the deed carried to the pier head line of 1890, as that point is not before the court under the pleadings..... 56

(2) Under the law of New York the conveyance "to the New York Bay" terminated at high water mark and such construction is corroborated by the map attached to the deed... 59

Conclusion ..... 63

## LIST OF CASES CITED


| | PAGE |
|---|---|
| Behn M. & Co. *v.* Campbell, 205 U. S., 403 | 54 |
| Benedict *v.* U. S., 270 Fed., 267 | 21 |
| Borkman *v.* Kurzman, 94 N. Y., 165 | 62 |
| Bradstreet, *ex parte,* 7 Pet., 634 | 59 |
| Bullitt County *v.* Washer, 130 U. S., 142 | 59 |
| Cairus *v.* Chabert, 3 Edw. Ch., 312 | 50 |
| Chamberlin *v.* Gleason, 163 N. Y., 214 | 50 |
| Chapman *v.* Barney, 129 U. S., 677, 681 | 59 |
| Chirac v. Reinicker, 11 What, 280 | 59 |
| Columbus Safe Deposit Co. *v.* Burke, 88 Fed., 630 | 54 |
| Corning *v.* Troy Iron & Nail Factory, 15 How., 451, 465 | 54 |
| Dooley *v.* Pease, 180 U. S., 126 | 13 |
| Farmers Loan & Trust Co. *v.* Waterman, 106 U. S., 265 | 55 |
| Filbin Corp. *v.* U. S., 265 Fed., 354 | 21 |
| Fleet *v.* Dorland, 11 How. Pr., 489 | 50 |
| Fritch *v.* U. S., 248 U. S., 458, p. 18 | 16 |
| Gibson *v.* Luther, 196 Fed., 203 | 54 |
| Gormley *v.* Bunyan, 138 U. S., 623 | 59 |
| Grayson *v.* Lynch, 163 U. S., 468 | 13 |
| Hamilton *v.* Kentucky Distillers & Warehouse Co., 251 U. S., 146, 156 | 12 |
| Hansen *v.* Boyd, 161 U. S., 411 | 33 |
| John Clarke Estate *v.* City of New York, 165 App. Div., 873 | 61 |
| Keyser *v.* Phitz, 133 U. S. 138 | 56 |
| Koenigsberger *v.* Richmond Silver Mining Co., 158 U. S., 41, 43 | 33 |
| Mason *v.* United States, 219 Fed., 547 | 54 |
| Matter of City of Buffalo, 139 N. Y., 422, 430 | 27 |
| Matter of City of New York, 222 N. Y., 370 | 30 |
| Matter of City of New York, 196 N. Y., 286 | 36-41 |
| Matter of Mayor, 40 App. Div., 281 | 30 |

PAGE

Matter of Minzescheimer, 144 App. Dic., 576; aff'd 204 N. Y., 272 ..... 30
McCray *v.* United States, 195 U. S., 27, 61 ..... 11
McRoberts *v.* Bergman, 132 N. Y., 73 ..... 60
Miller's Estate, Tuck., Surr., 346 ..... 50
Milligan, *ex parte*, 4 Wall., 2 ..... 11
National City Bank *v.* U. S., 275 Fed., 855 ..... 27-30
Norris *v.* Jackson, 9 Wall., 125 ..... 13
Ogden City *v.* Weaver, 108 Fed., 564, 567 ..... 54
Payne *v.* Niles, 20 How., 219 ..... 55
People *v.* Stillings, 136 App. Div., 438; Aff'd 198 N. Y., 504 ..... 30
Pfitsch *v.* U. S., 256 U. S., 547 ..... 20
Pine River Logging Imp. Co. *v.* United States, 186 U. S. 279 ..... 56
Prince Line *v.* U. S., 283 Fed., 535 ..... 21
Robertson *v.* Downing, 127 U. S., 607 ..... 15
Rockaway Park Improvement Co. *v.* City of New York, 140 App. Div., 160 ..... 61
Russell *v.* Russell, 36 N. Y., 581 ..... 48
Scholle *v.* Scholle, 113 N. Y., 261 ..... 48
Seaboard Air Line *v.* U. S., 280 Fed., 349 ..... 21
Stanley *v.* Supervisors of Albany, 121 U. S., 535. 13
Stillwell *v.* Doughty, 2 Brad. Surr., 311 ..... 50
St. Louis *v.* Rutz, 138 U. S., 226 ..... 13
Stoffregen *v.* Moore, 271 Fed., 680 ..... 55
The Francis Wright, 105 U. S., 381 ..... 13
Thomas *v.* Evans, 105 N. Y., 601 ..... 50
Tiffany *v.* Town of Oyster Bay, 209 N. Y., 1, 9.. 61
Trustees of East Hampton *v.* Kirk, 68 N. Y., 459 60
Turco *v.* Trimboli, 152 App. Div., 431 ..... 48
Union Pacific Railway Co. *v.* Chicago R. Co., 163 U. S. 564 ..... 56
United States *v.* Benedict, 280 Fed., 76 ..... 21

PAGE

United States *v.* Cohen Grocery Co., 255 U. S., 81, 88 ..... 12
United States *v.* Cross, 243 U. S., 316, 326..... 12
United States *v.* Healey, 160 U. S., 136..... 15
United States *v.* Hermanos, 209 U. S., 339..... 15
United States *v.* Highsmith, 255 U. S., 170..... 16-32
United States *v.* Joint Traffic Assn., 171 U. S., 505, 571 ..... 11
United States *v.* Pfitsch, 256 U. S., 547..... 15
United States *v.* Rogers, 255 U. S., 163.....11-16-32-56
United States *v.* Sargent, 162 Fed., 81..... 16-32
United States *v.* Seaboard Air Line, 280 Fed., 349 21
United States *v.* U. S. Fidelity & Guaranty Co., 236 U. S., 514..... 13
Ward *v.* Joslin, 186 U. S., 142..... 13
Wetmore *v.* Porter, 92 N. Y., 76..... 48
Williams *v.* Cox, 3 Edw. Ch., 178..... 50
Wright *v.* Hollingsworth, 1 Pet., 165..... 59

*Argued by*
ROYAL E. T. RIGGS.

IN THE

# Supreme Court of the United States

October Term, 1922.

| | |
|---|---|
| THE UNITED STATES OF AMERICA and CITY OF NEW YORK, Plaintiffs-in-Error, AGAINST GEORGE F. BENEDICT, as sole surviving Trustee of the Trust created by the last Will and Testament of WILLIAM C. LANGLEY, deceased, Defendant-in-Error. | No. 394. |

## BRIEF FOR DEFENDANT-IN-ERROR.

### Questions Presented.

The only question presented by the writ of error of the United States is whether the district court may allow interest on the market value of property ascertained as of the time of seizure, to the date of entry of judgment, as an element of "just compensation" in making an award under §10 of the Lever Act (Act of August 10, 1917, 40 Statutes 276, 279).

The question presented for determination between the United States and the City of New York and the

defendant-in-error is whether the Circuit Court of Appeals erred in requiring the plaintiff to execute an assignment of $162,240 of the judgment to the City.

## Statement.

This is an action brought by the surviving trustee of the estate of William C. Langley, deceased, against the United States, under Section 10 of the Food and Fuel Act of August 10, 1917, known as the Lever Act, for just compensation for several blocks of water front property in New York Harbor requisitioned by the United States for an army supply base.

This act provides:

> "That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the army or the maintenance of the navy, or any other public use connected with the common defense, and to requisition or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, seventy-five per centum will make up such amounts as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies." 40 Stat. 276.

Practically all of the property was requisitioned on April 6, 1918. Property lying in the projected lines

of proposed 58th and 63rd Streets had been overlooked in the description of the original requisition and this adjoining property was requisitioned on May 31, 1918.

The President, acting through the War Department, determined that just compensation to be paid to the owner was at the rate of $1.10 per square foot, amounting to $1,796,522.20, with interest thereon at the rate of 5% per annum from May 1, 1918. This amount was not satisfactory. The defendant-in-error accepted seventy-five percent of the said award with interest thereon at 5% from May 1, 1918 to July 11, 1919, the date of payment, and brought this action for just compensation.

The sole issue between the defendant-in-error and the United States of America was that of just compensation for the property taken. As plaintiff's entire property was taken no question of consequential damage was involved. The title of the defendant-in-error to the real property requisitioned was admitted, with the exception of the property comprised within the lines of proposed 61st, 62nd and 63rd Streets, extending from the westerly side of First Avenue to the high water mark, the title to which was claimed by the United States to be in the City of New York, (Stipulation, Exhibit W, Record, p. 309.)

The case was tried by the court without a jury, a stipulation waiving a jury having been signed by all of the parties and filed with the clerk pursuant to Sections 649 and 700, Revised Statutes. The court made special findings of fact and conclusions of law, in which it found that the value of the property requisitioned at the time of the appropriation thereof was $3,428,644, which was at the rate of $2.00 per square foot.

The United States submitted proposed findings conceding judgment against it for the unpaid balance of

the award, $440,126.55, with interest thereon from April 6th, 1918, to July 11th, 1919, the date of payment of the seventy-five percent. (Proposed Findings of Fact No. 8, Record, p. 281, fol. 449.)

The court found:

> "That just compensation herein for the taking and appropriation of said property hereinbefore described by the United States of America for public use is the sum of $3,428,644, with interest thereon at the rate of 6% per annum from the date of appropriation and dispossession of the owner therefrom." (Finding of Fact No. 13, Record, p. 274, fol. 435.)

The remaining findings of fact, numbered 17 to 21, Record, p. 275, 276, contain the necessary computations of interest and subtractions of the amount already received to arrive at the amount which, added to the amount already received, will be just compensation.

On January 5th, 1921, the court entered judgment against the United States for $2,439,474.17. Of this amount $358,266.82 was interest at 6%, the legal rate in New York, from April 6th, 1918, and May 31, 1918, upon the unpaid value of the property requisitioned respectively on those dates to the date of entry of judgment.

## Statement of the Case Between the Defendant-in-Error and the City of New York.

The War Department Board of Appraisers had refused to allow compensation to the Langley Estate for 81,120 square feet of land comprised within the projected lines of proposed 61st, 62nd and 63rd Streets from First Avenue to the high water mark of New York Bay. This refusal was based upon the ground that the property had been conveyed by the Langley Estate to

the City of New York by deed dated April 25, 1899, and was owned by the City of New York in trust for street purposes. The plaintiff claimed that this deed was absolutely void and conveyed no title.

By stipulation between the defendant-in-error and the United States, the title of the Langley Estate was admitted except for the real property comprised in the beds of 61st, 62nd and 63rd Streets "extending from the westerly side of First Avenue to high water mark." (Plaintiff's Ex. W, Stip., Record, p. 309.)

It was further stipulated by the City and the United States that the area in dispute at the time of the taking was 81,120 square feet (Stipulation, United States, Exhibit 1, Record, p. 309).

The City of New York was made a party defendant by order dated October 31, 1919, upon motion of the United States Attorney. (Record, p. 15.) This was for the sole purpose of binding the City of New York by adjudication to be made by the court upon the question of title. An amended complaint was served, alleging that the City claimed an adverse interest to that of the Langley Estate and stating that no personal claim was made against the City of New York (Amended Complaint, Record, fol. 38).

The City, in its answer, claimed title to the beds of the streets referred to as far as "the New York Bay" of 81,120 square feet, and demanded that the complaint be dismissed and such other relief as might seem just. (Answer, Record, p. 79.)

**At the trial the plaintiff offered in evidence an award of the War Department Board of Appraisers to the City of New York in order to prove that the United States of America had already made compensation to the City for adjoining property of the City requisitioned at the same time, including any**

**interest in these streets, and that the City had no claim to any compensation in this action. The City objected and the offer was thereupon withdrawn upon the concession of the City that it was entitled to no relief and claimed none in this action. (Record, fol. 86.) The City offered no proof as to value.**

The court reserved decision upon the question of title, (fol. 72) with the understanding that it was to be briefed later, and permitted the introduction of testimony upon the question of value upon both theories of ownership.

All of the witnesses for both the Langley Estate and for the United States of America testified that the property of the estate had the same market value in either instance; that if the streets were owned by the City of New York in trust for street purposes the balance of the property of the estate would be worth so much more; that if they were owned by the Langley Estate they were worth as much as any other part of the property and would be necessarily used for purposes of access to the water.

The court held in its opinion (See opinion, Record, fol. 63, 270 Fed. 267), that the deed was a conveyance in contravention of the trust by the trustees, and therefore absolutely void by the express provisions of §105 of the Real Property Law of New York, *but that the dispute was entirely immaterial upon the question of just compensation*; and made a special finding of fact, that the value of the plaintiff's property at the time of the taking was $3,428,644,

> **"whether or not the City of New York held title to the lands within the proposed limits of 61st, 62nd and 63rd Streets if projected from the westerly line of First Avenue to New York Bay in trust for street purposes."** (Finding of Fact No. 17, Record, p. 319, fol. 529.)

Subsequent to this decision the City of New York moved for the first time to amend its answer so as to claim title to the proposed streets, not only to the high water mark, but nearly 1,500 feet further out into the Bay to the pierhead line approved by the Secretary of War in 1890. (See motion to amend, Record, p. 269.) This motion to amend was denied, (fol. 425). In spite of its denial the City argues the cause as if the motion had been granted.

## The Decision of the Circuit Court of Appeals.

Both the United States and the City of New York sued out writs of error to the United States Circuit Court of Appeals for the Second Circuit.

The government argued that the streets belonged to the City and that the judgment was excessive by $162,240. The City urged that the complaint should have been dismissed, while the defendant-in-error claimed that the evidence supported the findings and the findings supported the judgment, and that the City had no right to review the judgment as it was not aggrieved by it.

The court held that the evidence supported the findings and that interest was allowable upon the value of the property from the date of its requisition (280 Fed. 76).

The court, however, held that the deed of 1899 from the trustees of the Langley Estate to the City was valid, and refused to approve the finding that the value of the property was the same whether or not the City held the title to the streets in trust for street purposes. The court stated that inasmuch as the valuation of the property was a mere matter of computation at $2 per square foot, it was obvious that the judgment was excessive so far as 81,120 square feet involved in the streets was

concerned. But instead of ordering a remittitur of that amount to the United States, the court ordered an assignment by the Langley Estate to the City of New York of $162,240 of the judgment, with interest, arrived at by taking 81,120 square feet at $2 per square foot. The court stated that upon the filing of such an assignment the judgment would be affirmed.

Thereafter and within the time provided, the Langley Estate executed and filed an assignment of $162,240 of the judgment with interest, in compliance with the above decision. The assignment contains the following condition:

> **"Provided, however, that should the Supreme Court of the United States upon review of this cause determine that the decision of this Court in requiring the assignor hereunder to execute and file this assignment, be erroneous for any reason, then this assignment shall be null and void."** (Assignment, Record, p. 334, fol. 554.)

Thereafter the judgment was affirmed with interest (Judgment of affirmance fol. 556) and the United States of America and the City of New York brought the cause to this court upon writs of error.

## Outline of the Argument.

The government's assignment of errors does not present the question of the right to interest for review.

The district court first determined the market value of the property as of the time of its seizure, and found as a fact that just compensation included interest thereon from the date of dispossession and ouster of the owner. Interest is a part of just compensation and is admitted to be such a part of just compensation by

the United States in conceding interest at 5% upon the award made by the President. The requisition and determination of the amount of just compensation by the President and the action in the district court by dissatisfied property owners are all parts of a proceeding in eminent domain instituted by the government. The rules for the determination of just compensation are the same whether a proceeding in eminent domain is begun by administrative order and seizure, as in the case at bar, or in the case of condemnation proceedings instituted by judicial decree. Interest, if allowable at all, should be allowed at 6% per annum, which is the legal rate in New York.

The Circuit Court of Appeals erred in requiring the plaintiff to execute to the City of New York the assignment of $162,240 of the judgment. The assignment, which is conditional upon its being affirmed in this court, permits the plaintiff to raise this question. The action of the court was erroneous (a) because the City had stipulated that it was entitled to no relief in this action and could obtain none, (b) because the title to the disputed streets under New York law was in the trustees and not in the City of New York, and (c) because the dispute as to title was found to be wholly immaterial upon the question of value.

The City's assignment of errors in the court below presented no claim to any part of the judgment and the action of that court in ordering the assignment was a plain error which may be remedied here.

The trial court denied a motion of the City made after the trial to amend its answer claiming to the pierhead line instead of highwater mark and that order may not be reviewed. The deed and map attached thereto show unmistakably that the City's claim is unfounded.

## ARGUMENT.

### POINT I.

**The only question raised by the United States is the right to interest and the assignments of error of the United States do not present that question for review.**

Neither the bill of exceptions nor the assignments of error in the circuit court nor this court preserved for review any ruling of the trial judge during the progress of the trial upon this precise point.

There are general exceptions to findings of fact Nos. 13, 17 to 21 as to market value, and in which interest is calculated and allowed, but these exceptions apply presumably to findings as to the market value of the property.

The exception to the finding (No. 13, fol. 435) that just compensation was the sum of $3,428,644, with interest thereon at the rate of 6% per annum from the date of dispossession of the owner, was simply that there was no evidence to sustain the same (Exceptions No. 5, fol. 463).

Surely this objection and exception did not present to the mind of the trial judge any claim that he could not allow interest as a part of just compensation.

On the other hand the government proposed a finding to the effect that interest from April 6, 1918, was due on the unpaid balance of the award made by the War Department which the government urged the court to adopt as the amount of just compensation due. (See proposed finding No. 8, fol. 448.)

The record shows that the entire dispute was as to the market value of the property at the time of the taking, and no where was there any ruling or exception upon the allowance of interest upon which an assignment of error could be based.

The assignments of error to the Circuit Court of Appeals did not specifically present this point as error (assignments of error, fols. 477-492).

This court has held that, in reviewing a judgment of the Circuit Court of Appeals, the only assignments of error open here are the ones urged in that court.

*United States* v. *Rogers*, 255 U. S. 163, p. 168.

The assignments of error to this court likewise fail to present the point (assignments of error, fols. 561-562).

## POINT II.

**Just compensation in this case must include interest upon the value of the property at the time of the taking from the dates of the actual appropriation thereof to the date of payment therefor.**

Sec. 10 of the Lever Act provides that the President shall ascertain and pay *just compensation*, and the district court is authorized to enter judgment for such amount, which added to the amount already received, will constitute *just compensation* to the property owner.

The Fifth Amendment to the Constitution of the United States provides that private property shall not be taken for public use without *just compensation*. This court has repeatedly held that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments.

*Ex Parte Milligan*, 4 Wall. 2, 121-127.
*United States* v. *Joint Traffic Assn.*, 171 U. S. 505, 571.
*McCray* v. *United States*, 195 U. S. 27, 61.

*United States* v. *Cress*, 243 U. S. 316, 326.
*Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 156.
*United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 88.

The obligation and pledge of the United States to make just compensation, therefore, is the same in war as in peace.

Interest was specifically demanded in the complaint (fol. 38).

The owner was actually dispossessed and ousted from his property and his property requisitioned by the United States on April 6, and May 31, 1918 (findings, 5 and 6, fol. 431; finding 14, fol. 435). Interest has been carefully computed upon the value of the property seized on each date (findings No. 14, fol. 435; No. 19, fol. 437).

**(1) The trial court found as a fact that interest must be included to make just compensation.**

The district court found that the market value of the property at the time of appropriation was $3,428,644 (finding of fact No. 12, fol. 434); that just compensation for its taking was the sum of $3,428,644 with interest thereon at the rate of 6% per annum from the date of appropriation and dispossession of the owner therefrom (finding of fact No. 13, fol. 435). In the remaining findings the court calculates the specific amounts of interest from the respective dates of the taking to the date of the entry of judgment (findings of fact Nos. 19 and 20, fols. 435-437) and then finds that the total amount to be added to the seventy-five percent of the award already received

which will be just compensation is the sum of $2,439,474.17 (finding of fact No. 21, fol. 437).

These findings of fact upon the amount of just compensation, in an action at law where a jury has been waived, are conclusive, if there is any evidence to sustain them.

*Norris* v. *Jackson*, 9 Wall 125.
*The Francis Wright*, 105 U. S. 381.
*Stanley* v. *Supervisors of Albany*, 121 U. S. 535.
*St. Louis* v. *Rutz*, 138 U. S. 226.
*Grayson* v. *Lynch*, 163 U. S. 468.
*Dooley* v. *Pease*, 180 U. S. 126.
*Ward* v. *Joslin*, 186 U. S. 142.
*United States* v. *United States Fidelity & Guaranty Co.*, 236 U. S. 514.

The United States now urges that the property owner is not entitled as a matter of law to the interest amounting in all to $358,226.82 accruing on the value of the property between the time of its appropriation and the entry of the judgment (findings of fact No. 19 and 20, fols. 437-438), which was found by the court below as a fact to be an integral part of just compensation. To deprive the property owner of $358,226.82 interest would be to lessen and diminish by that amount the just compensation to which he is entitled. There is no question presented as to whether the finding of the court or the verdict of a jury were intended to include interest, or as to the power of the court to add interest as a matter of law to the verdict of a jury. The question is purely one of fact, and the finding as to what constitutes just compensation is conclusive.

**(2) The United States has conceded that interest is a necessary part of just compensation.**

The President, through his agents the War Department Board of Appraisers, awarded to the Langley Estate as just compensation the sum of $1,796,522.20 with interest thereon at the rate of 5% per annum from May 1, 1918, to the date of the voucher for final payment. (finding of fact No. 7, fol. 432.) The President himself therefore, under the powers conferred by Section 10 of the Lever Act, has established the precedent that just compensation for this property must include interest from the date of the appropriation thereof. The President, however, awarded interest only at the rate of 5% per annum, although the legal rate in New York is 6% per annum, and fixed May 1st as the date when interest began to run—possibly as an average between the respective dates of taking, April 6 and May 31, 1918.

At the conclusion of the trial the United States submitted a finding expressly admitting its liability for the unpaid portions of the award and that the plaintiff was entitled to interest thereon from the date of April 6, 1918, to July 11, 1919—the date when the payment of the award was made (proposed finding of fact No. 8, fol. 449); and that plaintiff was entitled to judgment for $471,581.83. (proposed finding of fact No. 9, fol. 499). It therefore appears that the President conceded that interest at 5% from May 1, 1918, was a part of just compensation; that the United States in the court below conceded that it should begin on April 6, 1918, the date of appropriation, instead of on May 1, 1918, as fixed by the President, and we further claim that interest on the unpaid balance of the award has been calculated at 6% in the proposed finding, thereby conceding the liability for interest at 6%, the legal rate in New York.

The President, therefore, charged with the duty of determining and paying just compensation, has determined that just compensation must include interest in this case. Where the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department of the government charged with its execution.

*United States* v. *Hermanos*, 209 U. S. 339.
*United States* v. *Healey*, 160 U. S. 136.
*Robertson* v. *Downing*, 127 U. S. 607.

**(3) Section 177 of the Judicial Code does not apply.**

The United States argues that the allowance of interest is prohibited by §177 of the Judicial Code:

> "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the court of claims, unless upon a contract expressly stipulating for the payment of interest."

This is an enactment without change of §1091 Revised Statutes. The principle in this statute has been applied also in many cases involving claims against the United States in other courts sitting in lieu of the court of claims.

The prohibition cannot apply because—

**This action is not a claim in the court of claims or one of which that court would have jurisdiction.**

*United States* v. *Pfitsch*, 256 U. S. 547.

The question of the right to interest was squarely presented in the *Pfitsch* case. Judge Grubb had allowed interest on the value of the drill taken from the date of

seizure to the entry of judgment. If an action under §10 of the Lever Act was a claim of which the court of claims had jurisdiction, an appeal lay directly to this court. (*Fritch* v. *U. S.* 248 U. S. 458.) Judge Smith in *Filbin Corp.* v. *U. S.*, 266 Fed. 911, had decided that such an action was but one part of a proceeding in eminent domain in which the claimant was entitled to a trial by jury.

This court in the *Pfitsch* case held that such an action was not a claim against the United States and neither the court of claims nor the district court sitting in lieu thereof, had jurisdiction thereof; that Congress had created a new and exclusive jurisdiction in the district courts in which the trial would be with a jury. Necessarily this opinion, citing Judge Smith's opinion leading him to his conclusion that the claimant was entitled to a trial with a jury, determined that the action was not an ordinary claim against the United States, to which the usual prohibition as to the allowance of interest in the absence of statutory authority would apply, but part of a proceeding in eminent domain instituted by the government.

**(4) This action is merely one step in a proceeding in eminent domain instituted by the government in which just compensation is the issue and ultimate object.**

It must be conceded that in condemnation proceedings instituted by the government the property owner may receive interest on the value of the property taken as part of just compensation.

*United States* v. *Rogers*, 255 U. S. 163,
*United States* v. *Highsmith*, 255 U. S. 170.
*United States* v. *Sargent*, 162 Fed. 81.

In *United States* v. *Rogers* (*supra*), this court distinguished between a claim against the United States and a proceeding in eminent domain as follows (p. 169):

> "It is unquestionably true that the United States, upon claims made against it, cannot, in the absence of a statute to that end, be subjected to the payment of interest. *United States ex rel Angarica* v. *Bayard*, 127 U. S. 251, 260, 32 L. Ed. 159, 162, 8 Sup. Ct. Rep. 1156; *United States* v. *North Carolina*, 136 U. S. 211, 216, 34 L. ed. 336, 338, 10 Sup. Ct. Rep. 920, cited and approved in *National Home* v. *Parrish*, 229 U. S. 494, 496, 57 L. ed. 1296, 1298, 33 Sup. Ct. Rep. 944. In the present case the land owners did not sue upon a claim against the government, as was the fact in *United States* v. *North American Transp. & Trading Corp.*, 253 U. S. 330, 64 L. ed. 935, 40 Supt. Ct. Rep. 518. The government was seeking, for purposes authorized by statute, to appropriate the lands, and it had actually taken them, and had deprived the owners of all beneficial use thereof from the date from which the allowance of interest ran.
>
> "Having taken the lands of the defendants in error, it was the duty of the government to make just compensation as of the time when the owners were deprived of their property. *Monongahela Nav. Co.* v. *U. S.* 148 U. S. 312, 341, 37 L. ed. 463, 373, 13 Sup. Ct. Rep. 622.
>
> "In fixing the compensation the district court, and the circuit court of appeals in affirming the judgment, followed the New Mexico statute fixing the rate of interest at 6 per cent. This was in conformity with a former ruling of the circuit

court of appeals applying the statutes of Minnesota to lands appropriated in that state. *United States* v. *Sargent*, 89 C. C. A. 81, 162 Fed. 81.

"The government urges that the Conformity Act of August 1, 1888, does not require the United States Government to be bound by the rule of the state statute in the allowance of interest. This may be true, but we agree with the courts below that the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled. The fact that the rule is in harmony with the policy of the state where the lands are situated does not militate against, but makes for the justice and propriety of its adoption, *United States* v. *Sargent, supra.*"

In the *Sargent* case, cited and approved, the government brought proceedings in Minnesota, where the statutes provide for fixing of just compensation by commissioners in the first instance, with provision that either party might appeal, if dissatisfied, to obtain a judicial review of the award and for the hearing of the appeal by the court after the framing of the issues and the reassessment of the damages as justice might require. The court held that the payment of interest was not one of the modes of proceeding which was made compulsory upon courts of the United States by the conformity statute, but that it was satisfied to conform to it as a palpably fair and reasonable method of performing the indispensable condition of the right of eminent domain, namely of making just compensation for the land as it stood at the time of taking.

The United States relies upon *United States* v. *North American Transport & Trading Co.*, 253 U. S. 330. In that case certain lands in Alaska had been taken by the United States and the claimant brought action in the court of claims for the value of the property and also for a sum equivalent to the value of the use and occupation of the property from the time of the taking to the entry of judgment. The property had been taken under a statute which authorized the Secretary of War to acquire property and although the original taking had been tortious it had been subsequently ratified by the Secretary of War. The claimant urged that the value of the use and occupation should be awarded since it was but the equivalent of interest upon the value of the property taken. This court reviewed the previous decisions and said that the right to bring suit in the court of claims were not founded upon the Fifth Amendment, but was merely an action upon an implied contract by the United States to pay for property requisitioned. The case was not a proceeding in eminent domain and the opinion of this court emphasizes the distinction clearly. The opinion taken together with *United States* v. *Rogers* which was decided subsequently by this court, is convincing authority to the effect that in proceedings by eminent domain the ordinary principle prohibiting interest does not apply.

This court said (p. 337):

> "This may be the theory on which interest should be allowed in compensation proceedings; and it may be that, even in the absence of the conformity provision referred to above, interest could be collected as part of the just compensation in condemnation proceedings brought by the

government. For, as suggested in *United States* v. *Sargent*, 162 Fed. 81, such a proceeding is not a suit by the landowner to collect a claim against the United States, but an adversary proceeding in which the owner is the defendant, and which the government institutes in order to secure title to land. (*Mason City Ft. D. R. Co.* v. *Boynton*, 204 U. S. 570.) On the other hand, this suit brought in the court of claims, is a very different proceeding. It is an action of contract to recover money which the United States is assumed to have promised to pay; and the assumed promise was to pay the value at the time of the taking."

The claimant in that case had delayed the filing of suit for nearly six years after the taking, and many years had been consumed in the course of litigation, so that there was no default in payment which could be attributed to the United States. Interest in such a case would be damages for delay in payment. In this case it is part of the compensation necessary to make the owner whole. Suit was brought within two months after payment of 75% of the award.

Is this action, therefore, a claim upon an implied contract of the United States, or is it part of a "compensation proceeding" to which the ordinary rule as to interest does not apply?

The great weight of authority in the lower courts is that an action under §10 of the Lever Act is part of a proceeding in eminent domain instituted by the government, in which interest is allowable as a part of just compensation.

Grubb, *District Judge, in Pfitsch* v. *U. S.*, appeal dismissed, 256 U. S. 547.

Garvin, *District Judge, Benedict* v. *U. S.*, 270 Fed. 267.

Smith, *District Judge, Filbin Corp.* v. *U. S.*, 265 Fed. 354; *Seaboard Air Line* v. *U. S.*, reversed 280 Fed., 349.

Hough, Manton and Mayer, *Circuit Judges, U. S.* v. *Benedict*, 280 Fed. 76.

Woods, *Circuit Judge*, dissenting in *U. S.* v. *Seaboard Air Line*, 280 Fed., 349.

Chatfield, *District Judge, Prince Line* v. *U. S.*, 283 Fed. 535.

Contra—Waddell, *Circuit Judge*, Webb, *District Judge, U. S.* v. *Seaboard Air Line*, 280 Fed. 349.

In *Filbin Corp.* v. *U. S.*, 265 Fed. 354, cited by this court in *Pfitsch* v. *U. S.*, 256 U. S., p. 549, Judge Smith in very apt language pointed out the difference between a claim against the United States and this action as follows:

> "The taking and the method to ascertain the compensation are a part of the process of condemnation, being a particular method of condemnation provided by the Legislature under the exigencies of the case. The proceeding is in reality begun by the requisition. The application to have the compensation fixed is a part of that proceeding, necessarily subsequent, as depending upon the fact whether or not the owner of the property might agree to the sum fixed by the President as just compensation. If he so accepted it, there was no necessity for any further proceeding. If he were dissatisfied with it, then the expression

of his dissatisfaction, and the means taken to have it determined, were all a part of the condemnation as a whole.

"This proceeding, under Section 10, is not an original suit against the United States, to institute which needed express legislative permission. It is a part of the proceeding for condemnation originally instituted by the United States itself, and in which the United States is the actor; this being only the defensive answer of the property holder to assert his right to just compensation. No other interpretation consistent with the Constitution appears a reasonable one.

"The privilege given in the act for a party to sue the United States is not a privilege given to sue the United States in matters in which that privilege never theretofore existed. It is given as a part of the process of condemnation, without which title to the property could not be acquired by the governing body for public purposes. It does not come within the purview and scope of the general class of claims against the United States, resulting under contracts, or for damages for the unauthorized acts of its officers, who may be personally responsible, but for which the United States could not be sued without its consent."

The majority opinion in the *Seaboard* case (280 Fed. 349) sustains the government's contentions, but the views of these two judges and also of the judge in the Connecticut cases are opposed by the views of eight judges who have decided the point. The court held that the action was not a condemnation proceeding, and that even in a condemnation proceeding the right to in-

terest would be doubtful independent of the conformity provisions and a state statute permitting interest.

The fallacy of this opinion lies in the fact that the court regards condemnation proceedings instituted by judicial decree as the only method by which the sovereign right of eminent domain may be exercised so as to entitle the property owner to all elements of just compensation.

The government seeks to avoid the effect of the practical construction given to the statute by the President in awarding interest upon the value of the property and at the same time bring the case within the *North American* case by arguing that the procedure in the Lever Act is divisible into two parts and seeks to differentiate that part of the statute providing for the ascertainment of just compensation by the President from the latter part permitting a dissatisfied property owner to sue in the district court for just compensation. The government admits that the first part of the statute is a proceeding in eminent domain, but argues that the latter part involves only the presentation of a claim against the United States. The statement of this very argument shows its weakness.

The action of the owner in refusing to accept the award made by the President (in this case about half the real value of the property) and in instituting this action, seems to be regarded by the government as something reprehensible, which would subject the owner to the ordinary trials and delays and rules of litigation of claims against the United States. The government urges that the owner has his election whether to accept interest upon a concededly inadequate award by the President or whether to reject the award and obtain the market value of the property without interest. The owner, however, was no more forced to make such an

election in the procedure adopted by the Lever Act than he is by the existing similar procedure in many states by which either party dissatisfied with an award made by administrative officers may appeal for a judicial hearing and review.

The government concedes that some judicial proceeding in which the property owner may have an opportunity to present evidence and to be heard is essential to the exercise of power of eminent domain (see government brief, page 7). But the Lever Act provides for no such hearing or opportunity before the President. If the Act had stopped there, a property owner would have been forced to bring suit, in the court of claims, upon an implied contract as in the *North American* case or might have resisted the taking as illegal. But the Act went further and provided a full and complete opportunity for the owner to be heard and to present evidence in permitting the district courts to hear and to determine all these controversies. The only part of the statute which makes it a valid exercise, therefore, of the power of eminent domain and provides sure and certain compensation is that part providing for a court review. How illogical, therefore, to argue that the determination of the President *ex parte* is the real condemnation proceeding, but that the provision that the owner may sue the United States, if dissatisfied, is simply the presentation of a claim against the United States upon an implied contract.

Whether a condemnation statute permits the ascertainment of just compensation by the executive and provides that either party, if dissatisfied, may appeal or obtain a judicial review or places a burden upon the property owner of suing if dissatisfied, the court proceedings are surely an essential and integral part of the general scheme of condemnation.

**(5) The obligation to make just compensation is the same whether the government institutes the court proceedings or forces the property owner to do so.**

The power of eminent domain may be exercised either: (1) by administrative taking or seizure and a subsequent judicial proceeding to determine the amount of just compensation; or (2) by usual proceedings instituted by judicial decree where the compensation is first determined.

Mr. Nichols in his work on Eminent Domain, 2d Ed., Section 366 *et seq.* outlines the two distinct methods of procedure of taking land for public use and refers particularly to the taking by administrative order which has prevailed in Massachusetts and several other states since their earliest settlement. This procedure has the advantage of speed and will relieve the courts of controversy where land owners are satisfied with the awards determined *ex parte* by the condemning authority. It is, of course, essential to the validity of acts authorizing such procedure that provision be made for some judicial review and to insure certain and just compensation. Mr. Nichols says:

> "After the taking has been made the owners of the land taken are notified, and it devolves upon them, if dissatisfied with the award, to institute proceedings looking to a new award by a jury or other impartial tribunal. In such proceedings the land owner is actually as well as nominally petitioner or plaintiff and the corporation which made the taking is respondent or defendant. A personal judgment for the petitioner against the respondent is entered for the sum awarded in the same manner as a judgment in an action at common law, and as some provision for the certain payment of compensation is made before the taking is authorized, the owner event-

> ually receives his money, with interest from the day of the taking, although it may be long after he has been deprived of possession that he is paid."
>
> *Nichols on Eminent Domain,* 2d Ed., §369, p. 1016.

This method of procedure was adopted by Congress in §10 of the Lever Act under the necessity of speed in time of war, but the owner is entitled to the same compensation as if the government had brought the court proceeding instead of throwing the burden on him.

The Circuit Court of Appeals for the Second Circuit in this cause recognized that the difference in procedure had no effect upon the obligation to make just compensation as follows:

> "As to the interest, it is to be noted that the acquisition of property under the Lever Act is only a summary species of what are commonly called condemnation proceedings. The justification for any condemnation is the necessity of taking something from a private person for a public use; and the justification for the summary procedure of the act under consideration is the overwhelming necessity for speed under the dreadful pressure of war. But whether the taking be by familiar condemnation of peace or by the strong arm of a nation at war, the obligation upon the taker is always that recognized in this very statute, viz: to make 'just compensation' to the owner." (Opinion, Record, fols. 547-548, 280 Fed., p. 80.)

In his dissenting opinion in the *Seaboard* case Judge Woods said:

"Any proceeding prescribed or authorized by a state or the federal legislature to acquire land for public purposes and to ascertain just compensation for it is a condemnation proceeding; and every step taken in it from the beginning to the end is a part of the condemnation."

* * *

"The distinction that a land owner is entitled to interest when the government institutes the proceeding but is not entitled to it when the government forces him to institute it, is admittedly mounted on a technicality having no foundation in justice!" 280 Fed., 349.

Just compensation is always a judicial question.

*Cooley Constitutional Limitation,* (7th ed.) 817;
*Matter of City of Buffalo,* 139 N. Y. 422, 430;
*Monongahela Nav. Co.* v. *U. S.,* 148 U. S. 312.
*National City Bank* v. *U. S.,* 275 Fed. 855.

As stated in *Monongahela Navigation v. the United States,* 148 U. S. p. 327:

"The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered then the question of compensation is judicial."

In the same case this court quoted with approval the following extract from another opinion, p. 327:

"The right of the legislature of the state by law to apply the property of the citizen to a pub-

lic use and then to constitute itself the judge in its own case to determine what just compensation it ought to pay therefor or how much benefit it has conferred upon the citizen by thus taking his property without his consent or to extinguish any part of such compensation by prospective conjectual advantage or in *any manner* to interfere with the just powers and province of courts and juries in administering right and justice cannot for a moment be admitted or tolerated under our constitution.

"If anything can be clear and undeniable upon proof of natural practice or constitutional law, it seems that this must be so."

Congress may not, therefore, determine by statute what is just compensation. Nor may its amount be lessened or increased by the exercise by Congress of a choice of a mere method of procedure. Congress may not determine the amount of just compensasation in deciding whether the government shall institute the proceeding or whether it must be commenced by a dissatisfied land owner. It is unthinkable that the distinction pointed out by Judge Woods should be adopted as law. To let Congress prescribe the amount of just compensation by the choice of procedure would permit Congress indirectly to encroach upon the prerogatives of the judiciary.

When Congress had the Lever Act under consideration it was confronted with the alternative of either giving the President the power to seize the property required for governmental purposes forthwith, leaving the question of compensation to be determined in an action to be instituted by the owner in the court of claims on the theory of an implied promise to pay, or to institute con-

demnation proceedings which would take considerable time and which would delay the government in obtaining possession of the property in which condemnation proceeding the owner would have the use of his property until the amount of compensation was fixed and determined, and that amount with interest down to the time of payment paid to the owner.

Congress must have seen that the ordinary form of condemnation proceeding would not do, for the government was anxious to get immediate possession of the property and in time of war it would not do to wait for possession until the amount of compensation had been fixed and the amount paid with interest to the time of taking possession. On the other hand Congress apparently felt that it would be unfair to the owner of the property to forthwith take possession of the property, leaving the owner to his action for damages in the court of claims where he would only recover the value of the property years after the event.

Congress determined upon a procedure which would put the government into immediate possession of the property and provide for a method of ascertaining compensation in line with the procedure existing in some States, notably in the State of Massachusetts. And so Congress conceived of this form of condemnation procedure and provided that the President should have the power to seize and "shall ascertain and pay a just compensation therefor." Just how the President should ascertain and pay just compensation is not set forth in the statute. No opportunity for hearing or to present evidence was awarded the property owner, but just compensation was pledged. Congress knew that the amount of just compensation is always a question for the judiciary to determine, and therefore so provided in the Act. In doing so, Congress necessarily authorized the pay-

ment of interest where the court determines that interest must be paid as a part of just compensation.

The argument that just compensation may not include interest because the statute does not expressly authorize it by that name is beside the point. The entire question is not within the province of Congress to prohibit either in express terms or by implication, or by a mere choice of procedure.

**(6) Just compensation by definition includes interest from the time of appropriation to the date of payment.**

The Fifth Amendment to the Constitution and the Lever Act both guarantee just compensation. The Constitutions of New York State and of practically all the other states also guarantee just compensation to a property owner whose property is taken by eminent domain.

Under the law of the State of New York just compensation to be paid to a property owner where private property is taken for public purposes must include interest from the date of appropriation and of the exclusion of the owner from his property. The rule is set forth by Scott, *J.*, in *People* v. *Stillings*, 136 App. Div. 438, p. 441, affd. 198 N. Y. 504 on opinion below:

> "The theory of the law of condemnation is that payment for the land taken shall be coincident with the taking, and if for any reason payment is postponed the right to interest from the time that payment ought to have been made, follows as a strict constitutional right."

See also

*Matter of Mayor*, 40 App. Div. 281,
*Matter of Minzesheimer*, 144 App. Div. 576; affd. 204 N. Y. 272,
*Matter of City of New York*, 222 N. Y. 370.

This is the definition of just compensation adopted in practically every other State in the Union. There is some difference of opinion as to what constitutes an appropriation so as to set interest running, but all decisions agree that just compensation includes interest from the date when the owner is dispossessed.

*Lewis on Eminent Domain,* (3rd Ed.) § 742, p. 1319.

*Nichols on Eminent Domain* (2nd Ed.) § 216, p. 649.

20 *Corpus Juris,* 807, *et seq.,* and cases cited.

This is likewise the definition of just compensation in the Fifth Amendment.

Just compensation means a full and fair equivalent to be returned to the owner as of the time when the owner is deprived of his property.

*Monongahela Navigation Co.* v. *United States,* 148 U. S. 312.

The plaintiffs' property was worth $3,428,644 in 1918. Payment in full has not yet been made and may not be made for years. The property was held in trust during the life of life tenant with remainder to the grandchildren of testator. Payment of $3,428,644 would represent and restore to the estate only the principal thereof of 1918. If interest is not paid, is it not clear that the life estate has been confiscated without any compensation? No better example could be obtained of the necessity of determining that interest is a necessary part of just compensation.

It is obvious that if it is the government's duty to make compensation as of the time of the taking, and payment of compensation is long delayed, interest is payable, not as damages or penalty due because of any

default in payment but as an element necessary to make the owner's loss whole. So therefore we find this Court has held:

> "We agree with the courts below that the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled."
>
> *United States* v. *Rogers*, 255 U. S. 163, p. 168; *United States* v. *Sargent*, 162 Fed. 81.

Just compensation must include a sum equivalent to interest as a matter of law where the court or jury determines the value of the property as of the time of its seizure *United States* v. *Highsmith*, 255 U. S. 170.

**(7) The requirement as to just compensation will not be satisfied unless this Court directs that interest be paid on the judgment itself.**

A general immunity of payment of interest on claims and judgments as damages generally cannot deprive the Courts of the power to require interest on the judgment in this action.

In *United States* v. *Rogers* (*supra*) this court held that interest was payable on an award for property *"from the time of taking until payment,"* and we have, we believe, successfully demonstrated that this proceeding is governed by the same rule.

The Government refused to pay interest on the judgment itself in the *Pfitsch* case, and asserts generally the doctrine that interest does not run on judgments against the United States.

It is obvious that if interest runs at all, it runs until payment. The Circuit Court of Appeals affirmed the judgment with interest. No question is made however

in the assignment of error of the correctness of the affirmance with interest, nor is the point raised by the brief. We refer to the matter, however, so that the plaintiff's position will be clearly understood.

## POINT III.

**The Circuit Court of Appeals erred in requiring the Langley Estate to execute an assignment of $162,240 of the judgment to the City of New York and the assignment should be declared null and void.**

In compliance with the decision of the Circuit Court of Appeals and in preference to recourse to a new trial and the prolongation of an already lengthy and expensive litigation, the Langley Estate executed and filed a conditional assignment by way of a remittitur of $162,240 of the judgment to the City of New York.

We concede at once that ordinarily the filing of a remittitur would be a waiver of our right to complain of the decision of the Circuit Court of Appeals.

> *Koenigsberger* v. *Richmond Silver Mining Co.*, 158 U. S., 41, 43.
> *Hansen* v. *Boyd*, 161 U. S. 411.

The situation here is very different, however, from that ordinarily involved in the filing of a remittitur. The United States claimed in the Circuit Court of Appeals that the streets belonged to the City, that the judgment was excessive by $162,240. The City claims that the assignment was correctly ordered and even asks that more of the judgment be assigned to it. It seemed inevitable that the correctness of the decision of the Circuit Court of Appeals in ordering the assignment would necessarily be examined in any review of the cause in this court.

With that full understanding and with the obvious desire that the correctness of its rulings should be open for examination in this court and that the assignment should not be valid if this court disagreed, the Circuit Court of Appeals accepted an assignment from the Langley Estate to the City as a compliance with its decision, which contained the following condition:

> "Provided, however, that should the Supreme Court of the United States upon review of this cause determine that the decision of this court in requiring the assignor hereunder to execute and file this assignment, be erroneous for any reason, then this assignment shall be null and void." (Assignment, Record, p. 334, fol. 554.)

The conditional form of the assignment by way of remittitur and the fact that the City challenges its correctness as not going far enough, necessarily brings the assignment before this court for review.

**(a) It was conceded upon the trial that the City asked for no relief and could obtain none in this action.**

The action of the Circuit Court of Appeals in ordering an assignment of $162,240 of the judgment by the plaintiff to the City of New York was a complete surprise to all the counsel in the cause. No one had anticipated that the City was entitled to any portion of the judgment and the question of the City's right to any affirmative relief was not argued in the Circuit Court of Appeals.

The United States Government had requisitioned simultaneously with the property of the Langley Estate property adjoining belonging to the City of New York and an award to the City for its property which included any interest it had in 61st, 62nd and 63rd

Streets had been made. Upon the trial of the action the plaintiff offered in evidence that award (No. 591) made by the War Department Board of Appraisers to the City of New York, for the purpose of showing that the City had been compensated already for any interest it claimed in these disputed streets:

> **"Mr. Riggs: I offer in evidence award made by the War Department Board of Appraisers to the City of New York, dated June 25th, 1919, No. 591."**
>
> **Mr. Kenney (for the City of New York): Objected to. We have not asked for any relief and we cannot get it in this proceeding."**
>
> **"Mr. Riggs: I will withdraw the offer of the award No. 591 upon that stipulation."** (Record, fol. 86.)

But, in spite of this stipulation that it was entitled to no relief, the City has now been awarded a substantial part of the judgment in this action. It is only fair to state, however, that this was not brought to the attention of the Circuit Court of Appeals because no one of the counsel, including the Corporation Counsel for the City, had ever suggested in his brief or in the argument that the City was entitled to any portion of the judgment or entitled to any relief except that the complaint against it be dismissed. The point was not argued nor discussed, as all of the counsel knew of the stipulation.

The assignment of error of the City to the Circuit Court did not claim the right to any part of the judgment but only that the City was entitled to judgment dismissing the complaint (fol. 404).

The award No. 591 to the City has been rejected by the City and since the decision of the Circuit Court of Appeals and the filing of the assignment, the City has also commenced an action in the District Court for

the Eastern District of New York against the government for just compensation for its property in these identical streets. We believe the court may take judicial notice of this action (*Butler* v. *Eaton*, 141 U. S., 240) and application will be made on the argument to submit the City's complaint (*Dakota County* v. *Glidden*, 113 U. S. 222). If the Circuit Court of Appeals is correct the City will receive a substantial portion of the judgment in this action; it will also be compensated in its own action for its interest in the streets, if any, so that the action of the Circuit Court of Appeals may result in the City being paid twice for the same property. Moreover, the action of the Circuit Court of Appeals determines that property held in trust by the City of New York for street purposes has a substantial market value, when the Court of Appeals of the State of New York has determined, as a matter of law, that property within the lines of a street burdened with a trust for street purposes and disassociated and disconnected from any adjoining property as was this property, is of nominal value.

*Matter of City of New York*, 196 N. Y., 286,

Obviously, any dispute as to the value of the streets when owned by the City of New York in trust for street purposes should have been left for determination in the City's action against the United States.

The City having stipulated that it was entitled to no relief in this action, and having induced the defendant-in-error by that stipulation to withdraw evidence designed to show that it had already been compensated for its interest in these streets and having no assignment of error except that the complaint should have been dismissed, is urging its claim to sustain the assignment, and even carry it further, in violation of fundamental professional ethics, and is estopped from

asserting any claim to a portion of the judgment in this action.

**(b) The Circuit Court of Appeals erred in ordering the assignment to the city to be executed because the market value of the property taken was the same even if the city held title to the disputed streets in trust for street purposes; and defendant-in-error was entitled to all of the judgment.**

The issue of title between the Langley Estate and the City of New York was first tried and when the deed from the estate to the City was offered in evidence it was objected to upon the ground that it was void in law. The court thereupon stated that he would receive the deed in evidence and receive briefs later as to its validity. The deed was thereupon received in evidence "with the understanding that the question with respect to the title conveyed by it is to be discussed by counsel" (fol. 72).

The trial on the question of value with the United States then proceeded and the expert witnesses called on behalf of the estate testified upon both theories of ownership of the disputed 81, 120 sq. ft., as follows:

> "Graham—Q. Now assuming, Mr. Graham, that at the time of the requisition by the United States Government the land comprised within the beds of 61st, 62nd and 63rd Streets was owned by the City of New York from First Avenue to the then existing high water mark for street purposes, what was the value of the property requisitioned by the United States Government?
>
> "A. The same, (*i. e.*, Three million four hundred twenty-eight thousand six hundred forty-three dollars and eighty cents). (fol. 110.)
>
> "Porter—Q. Now assuming Mr. Porter, that the title to 61st, 62nd and 63rd Streets from the

westerly side of First Avenue to the high water mark was in the City of New York on that date, what, in your opinion, was the market value of the property of the Langley Estate?

"A. Three million four hundred and twenty-eight thousand six hundred and forty-four dollars.

"Q. That is the same?

"A. Exactly (fol. 158).

"Farley—Q. If the title to 61st, 62nd and 63rd Streets from the westerly side of First Avenue to the high water mark was in the City of New York on the date I have mentioned, what, in your opinion, was the market value of the property?

"A. Three million eight hundred and fifty-seven thousand two hundred twenty-four dollars.

"Q. That is the same.

"A. Yes, sir (fol. 213).

"Pounds—Q. Did I also ask you to make an appraisal of the property upon the assumption that the title to the streets from the westerly side of First Avenue to the existing high water mark as of April, 1918, was in the City of New of 61st, 62nd and 63rd Streets?

"A. You asked a figure both ways.

"Q. What in your opinion was the value of the property upon the assumption that those streets I have enumerated belonged to the City of New York in 1918?

"A. The same as the figure just given (fol. 289."

These expert witnesses for the plaintiff were vigorously cross-examined with reference to this opinion and stated in substance that if the property belonged to the City of New York in trust for street purposes the value

of the lands in the streets would be reflected back into the balance of the property owned by the trustees abutting upon the streets; that the property within the streets would necessarily be dedicated by the Langley Estate for the purposes of access to the water, when a time for improvement of the property arrived.

When the government witnesses testified they also agreed with this opinion:

> "Morrissey—Q. In making your estimate of value, will you tell me whether or not that estimate as to the value of the property would be changed if you assumed the City had the title to 61st, 62nd and 63rd Streets, as the beds of them would be carried out to the high water mark?
>
> "A. It would not.
>
> "Q. And that would include 81,120 square feet.
>
> "A. Yes, sir.
>
> "Q. The value, you say, would still be the same.
>
> "A. Yes (fol. 325).
>
> "Hovenden—Q. If it should appear, Mr. Hovenden, that the City had the right to the bed of 62nd and 63rd Streets, extending from the west side of First Avenue to the high water mark, and that the area contained in the beds in the streets as so laid out, amounting to 81,120 square feet, would that, in your opinion, change the value of this Langley property?
>
> "A. It would not.
>
> "Q. You would still say that the value which you placed on it——
>
> "A. Would be reflected back into the balance of the land" (fol. 357).

Counsel for the defendant-in-error thereupon called the court's attention to the fact that all the experts agreed upon this point and that "inasmuch as the experts testified for both sides and that as it was apparent that the City had been compensated for whatever interest it had, that the question of title need not be determined" (fol. 358). Again, at the end of the case the court suggested:

> "The Court—Why not give the City title to this property? I think I shall do so unless some strong reason is advanced why I should not" (fol. 419).

In the court's opinion he holds, as a matter of law, that the deed was void and expressly states with reference to the dispute of title: "The determination of this dispute does not affect the value of the plaintiff's property. All parties agree that if the City owns these streets the opening thereof would be reflected in the value of the land adjoining; if the Langley Estate is held to be the owner it would use the land in the proposed street for access to the water front upon the improvement of the property" (fol. 61, 270 Fed., p. 268).

In order to make it clear that the dispute as to title was immaterial upon the question of value, the court also found "that the fair and reasonable market value of said property for public purposes at the time of such requisition was Three million four hundred twenty-eight thousand six hundred and forty-four dollars ($3,428,644) whether or not the City of New York held title to the lands within the proposed limits of 61st, 62nd and 63rd Streets projected from the westerly line of First Avenue to New York Bay in trust for street

purposes" (finding of fact No. 17, record, p. 275, fol. 436).

Throughout the trial and in the finding it was understood perfectly that the finding referred to the conditions as they actually existed at the time of the requisitioning of the property. The dispute indeed affected only 81,120 square feet out of 1,714,322 square feet requisitioned, a little less than 5% of the entire property.

The Circuit Court of Appeals refused to follow this finding, stating in substance that the finding meant that if and when the streets were opened the abutting property would, by reason of the streets, be worth an additional sum equal to the value of the land appropriated for highway property; but that as no streets had been opened the Langley Estate was being compensated upon the basis of conditions which did not exist, and the court said: "That it is held in trust for a public purpose does not in any way change its market value and the City has been as much deprived of what it owned as was the Langley Estate" (fol. 552). This is not correct. The expert witnesses all agreed that the mere holding of title to the property by the City in trust for street purposes was the condition upon which they based their opinion. Nothing whatever was said about the actual opening of streets or their being paved or guttered.

The fundamental error in the opinion of the court below lies in disregarding the fact that the streets, if owned by the City of New York in trust for street purposes could be used only for a special limited purpose, and had only a nominal value.

*Matter of the City of New York*, 196 N. Y., 286.

If the City owns property in trust which it may use for no other purpose than a street, and particularly property on which it has never expended anything for sewers, paving, gutters or other improvements, its damage is merely nominal when the property is taken for superior public purposes. It can only be used for purposes of a street, while as long as the land was owned by the Langley Estate it could be used for any purpose and was as valuable as any other portion of the premises. When owned by the Langley Estate it had a market value of $2.00 per square foot. As soon as it was conveyed to the City its market value to the City of New York was, under the law of New York nominal. What became of the difference between its original value when owned by the Langley Estate in fee and nominal value as held in trust by the City? Surely, it was reflected into the balance of the property owned by the Langley Estate.

The theory of the expert witnesses for both the plaintiff and the government was, therefore, correct, and not based upon any state of facts other than the mere ownership of the disputed property in trust for street purposes by the City.

It is apparent that the City's claim to the streets could be sustained, and the complaint against it dismissed and at the same time the judgment in favor of defendant-in-error affirmed in its entirety.

If, however, the Circuit Court's opinion is correct a remittitur of $162,240 of the payment to the United States should have been ordered, and the City left to its remedy in an action when the value could be determined by proof.

**C The Circuit Court erred in requiring the execution of the assignment, for the quit claim deed of the trustees of the Langley Estate to the City of New York of April 25, 1899, was not**

**authorized by the power of sale in the will and was absolutely void as in contravention of the trust.**

The validity of the deed depends entirely, of course, upon the local law of the State of New York. The President in awarding compensation had deducted 81,120 sq. ft. at $1.10 per square foot from the award. We claim that, if this deduction was correctly made, the deed was void for it conveyed part of the corpus of the trust in violation of the trustees' authority.

The will of William C. Langley gave to his trustees a power for sale expressed as follows:

> "I hereby authorize and empower my said executors and trustees and their successor and successors, to sell at their discretion as to the time and terms and at public or private sale, all and every part of my real estate, and to execute and deliver all necessary and proper assurances and conveyances for the same to the respective purchasers thereof." Will (fol. 533.)

The authorization is therefore "to sell" and the terms of the sale and time or whether the sale shall be at public or private sale are left to the discretion of the trustees. The testator obviously intended to clothe them with power to determine how much should be paid in cash or by purchase money mortgage, and the interest rate and maturity of any such mortgage. It was, however, nothing but a "sale" of real estate which he authorized.

The trustees held the property in trust, with remainder to the testator's grandchildren. The will clearly expressed the trust.

Section 105 of the Real Property Law of the State of New York was as follows:

> "If the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee in contravention of the trust, except as provided in this section, shall be absolutely void."

The exception referred to in the remaining portions of the section is immaterial upon this question.

Every *sale, conveyance* or *act* of the trustees in contravention of the trust is declared absolutely *void,* not *voidable.* A conveyance in contravention of the trust confers no title upon the grantee. The grantee is deemed in law to possess knowledge of the terms of the trust where the trust is expressed in the instrument creating it and takes a conveyance from trustees at his peril.

William H. Langley, the life beneficiary, also a trustee, and Charles E. Goodrich, the other trustee, conveyed to the City of New York the lands comprised within the lines of certain projected streets to New York Bay. The consideration for the deed was:

> "That the consideration for such deed was the possible future exemption of the remainder of said property owned by the said trustees from assessment on any future proceedings by the City of New York for the opening of said streets; that the property within the limits of 61st, 62nd and 63rd Streets from the westerly line of First Avenue to New York Bay remained in the possession of the grantors; that such streets—61st, 62nd and 63rd were not opened by the City of New York" (finding of fact No. 16, fol. 436).

There was no sale, therefore, for cash or either part cash and part mortgage. There was no real considera-

tion for the deed for the streets were never opened by the City of New York so that an opportunity for exemption from assessment never arrived.

Section 992 of the Greater New York Charter provided as follows:

> "The owners of land and of all the estate herein embraced within the lines of any street laid down and shown on the map or plan of the City of New York, and comprising all the land within said lines in an entire block in extent, may, *without compensation*, and at their own expense, convey all their right, title and interest therein, providing the same shall be free from incumbrances inconsistent with the title to be acquired by the City, to the City of New York, and upon delivery of such conveyances to the corporation counsel of said city, with the money necessary to record such conveyances, and affidavits made by all such owners to the effect that the persons making them are the owners of the estates in such lands so conveyed by them, respectively, and stating their interests, and that such estates in such lands are free of all incumbrances, except as aforesaid, together with abstracts of title and complete searches if desired by such corporation counsel to examine such conveyances and papers, and if such title shall not be rejected for good cause, by such corporation counsel, he shall cause the said conveyance to be recorded in the office in which conveyances of real estate are recorded in the county in which such lands are located within sixty days after their delivery to him, and file them with the comptroller of such city, and thereupon the City of New York shall become vested

> with the title to said land to the same effect and extent as if they had been acquired by a proceeding taken for the opening of that portion of said streets; after the making and acceptance of such conveyances, no proceedings to open the lands so conveyed shall be taken or maintained, nor shall the lands fronting on that portion of the streets so conveyed, and extending to the centre of the block on either side of such portion of said street as conveyed, be chargeable with any portion of the expenses of opening the residue or any portion of the residue of such street, except the due and fair proportion of the awards that may be made for buildings as aforesaid."

In order, therefore, to authorize any exemption from assessment under that section the land conveyed to the City must (1) comprise an entire block in extent, (2) the conveyance must be without compensation, (3) the conveyance must be at the expense of the grantors, (4) the grantors must advance the necessary recording fees; and (5) the City of New York became vested with title of the land only to the same extent as if the streets had been acquired by a proceeding taken for their opening.

The trustees were not authorized to convey the corpus of the estate for such a consideration.

The court below said:

> "It will not do to stop with any narrow definition of the word 'sale', which in its ordinary sense means a transfer of property for a fixed price in money or its equivalent (Citing *The Five Percent Cases*, 110 U. S. 471, p. 478)."

It is unnecessary to determine whether the words "to sell" indicate the intention of the testator that a

sale should be only for cash. We have never so contended. But it must be for cash *or its equivalent, i. e.,* bonds, mortgages, or securities of a fixed value—some sales price which would take the place of the property sold in the corpus of the trust estate, produce an income, and descend to the remaindermen. It was the intention of the testator that the trustees should either hold the land or obtain money or its *equivalent, i. e.,* something of fixed value immediately convertible into money. In the *Five Percent* cases referred to by the Circuit Court of Appeals, where this court was defining an act of Congress providing for the admission of the State of Illinois into the Union, by which "five per cent of the net proceeds" of public lands afterwards "sold by Congress" should be reserved and appropriated for certain public uses within the states, this court said:

> "A sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money *or its equivalent.* When property or money is transferred or paid as a compensation for services, the property or money may be said to be the price of the service; but it can hardly be said that the service is the price of the property or money, or that the property or money is sold to the person performing the service." (110 U. S. 471, p. 487.)

This court thereupon held that the State of Illinois was not entitled to a percentage of the value of public lands disposed of by the United States in satisfaction of military land warrants.

The suggestion in the opinion of the Circuit Court of Appeals that the *equivalent* for money might be, there-

fore, a possible exemption for assessments for street openings, is superficial. Applying the definition of a sale, if a trustee is entitled to sell the corpus of the estate for money or its *equivalent*, it must be interpreted as meaning that the *equivalent* which may be received by the trustee in the place of money are mortgages or securities or bonds of some fixed value readily convertible into money. Nothing can be the *equivalent* of money except something the value of which is fixed and is also readily transmutable into money. A claim for exemption from assessment for future street openings is certainly not convertible into money, nor is the amount of the equivalent of money fixed. Such a claim is vague, uncertain, undetermined and from its inherent nature impossible to be measured in terms of money. Its value constantly varies, particularly where there is no time fixed within which the streets must be opened. It is possible that, if streets are not opened, it will be of no value whatever, as in the case at bar.

A power of sale conferred upon a trustee is interpreted in the New York decisions in even a narrower sense. Under those decisions the power of sale is sometimes violated even where the *equivalent* of money is fixed and constant.

*Russell* v. *Russell*, 36 N. Y., 581,
*Wetmore* v. *Porter*, 92 N. Y., 76,
*Scholle* v. *Scholle*, 113 N. Y., 261,
*Turco* v. *Trimboli*, 152 App. Div. 431.

The leading case in New York is *Russell* v. *Russell (supra)*. In that case a testator gave all his real and personal estate to his wife for her life with the remainder to his four children. The testator gave power

to his wife to sell and dispose of his real estate or any part thereof at public or private sale as she should deem most expedient and for the best interests of his legatees. By "his legatees" he intended to designate his four children. The widow had no interest in the execution of the power of sale as the income only belonged to her and the corpus of the estate belonged to the remaindermen. In other words, the estate was a trust estate for life to the person exercising the power of sale with a remainder to others, exactly as was the situation in the Langley Estate. The trustee conveyed a portion of the testator's real estate to one of his sons in satisfaction of a debt due to the son from the testator. The court held that such a conveyance was not a good execution of the power of sale and that no title passed to the son by the conveyance, citing Section 65 of Revised Statutes, now Section 105 of the Real Property Law, hereinbefore quoted; that no title passed by the attempted execution and the power of sale, and that the estate descended to the remaindermen unaffected by the conveyance. Here is a case identical with the case at bar. Surely the extinguishing of the debt due to the son from the decedent, was a fixed consideration equivalent to money, yet a transfer from the trustee in return for the satisfaction of such a debt was held not to be a valid exercise of the power of sale, but an act in contravention of the trust.

In *Scholle* v. *Scholle (supra)* a deed given by trustees in consideration of the extinguishment of a claim, against the estate was held not to be a valid exercise of the power of sale, and in *Turco* v. *Trimboli (supra)* the court held that an executor with the ordinary power of sale over real estate had no power to exchange real

estate for other lands, and that such an exchange was an act in contravention of the power of sale.

The logic and reason underlying the rule is made distinctly clear by the application of the result of the case at bar in the Court below and by the President in deducting 81,120 sq. ft. from the amount of the awards. William H. Langley, one of the trustees, was the life beneficiary entitled to receive the income from the corpus of the trust estate. He was not entitled to purchase exemption from assessment for future street openings for the estate by throwing the entire cost upon the remaindermen and by conveying to the City a substantial part of the corpus of the estate. Under the laws of the State of New York if the City had instituted street opening proceedings, the rule would apply that municipal assessments for permanent improvements are apportionable between the life tenant and the remaindermen.

*Cairus* v. *Chabert,* 3 Edw. Ch., 312,
*Stillwell* v. *Doughty,* 2 Brad. Surr. 311.
*Millers Estate,* Tuck., Surr. 346,
*Williams* v. *Cox,* 3 Edw. Ch., 178,
*Fleet* v. *Dorland,* 11 How. Pr. 489;;
*Thomas* v. *Evans,* 105 N. Y. 601,
*Chamberlin* v. *Gleason,* 163 N. Y. 214.

As stated in *Chamberlin* v. *Gleason,* 163 N. Y., p. 219:

> "The general rule is that municipal assessments for permanent improvements are apportionable between the life tenant and the remaindermen according to the circumstances of the case and their respective interests in the property

(citing *Thomas* v. *Evans,* 105 N. Y., 601; *Peck* v. *Sherwood,* 56 N. Y. 615)."

If the conveyance had not been made and the City had instituted street opening proceedings any assessment for such a permanent improvement would therefore have been proportioned between the life tenant and remaindermen of the estate according to the tables of mortality, set forth in New York Rules of Practice 70, *Kirchner* v. *Kirchner,* 71 Misc. 57.

Notwithstanding this rule, by the delivery of the conveyance the trustees conveyed or undertook to convey away a portion of the estate *which if this decision is correct, has resulted in direct loss to the corpus of the estate of* $162,240. If the deed had not been delivered and the streets had been opened, a large proportion of any assessment for street openings, when assessed, would necessarily have been assessed upon the life tenant, who was one of the trustees who violated the power of sale.

No more vivid reason why the conveyance of the trustees was in contravention of the trust can be presented than the decision of the court below in depriving the remaindermen of $162,240 of the judgment because of this deed.

The Circuit Court of Appeals refers to the *Matter of 67th Street,* 60 How. Pr. 264, which has nothing whatever to do with the definition of the power of sale bestowed upon the trustees by a testator. That case did not involve a conveyance of the title to the corpus of a trust estate. The case holds that where executors in developing a large undeveloped tract of property, to sell lots abutting on unopened streets, filed a map dedicating part of the property as streets, they so burdened the unopened streets with easements of access and for

public purposes, that they are not entitled to any award when the fee of the streets was eventually condemned. The dedication was upheld as an incident of their powers because the dedication resulted in increased value for the lots remaining unsold. We have no quarrel with that doctrine. In this case we urged that the value of the land in the streets was reflected in the adjoining property. But the court has decided otherwise and deprived us of $162,240 of the judgment.

In *Simmons* v. *Crisfeld*, 197 N. Y. 365, which is referred to as approving *Matter of 67th Street*, the court held that an executor authorized, although by a naked power of sale, had power to convey, as appurtenant to part of the land, when sold, an easement of light, air and prospect over the remainder of the land, where the easement is requisite for an advantageous sale. No question of the right to sell the fee in consideration of an exemption from assessment is involved. The same effect that the transfer resulted in advantage to the remainder of the estate should be noted.

The distinction between those cases and the case at bar is that in the dedicatory cases, the executors act for the benefit of the estate, and the value of the property dedicated is reflected in the balance of the land. In this case, no one could tell until after the streets had been opened and the awards to be received by the estate had been balanced against the assessments to be paid, whether the act of the trustees was beneficial or detrimental to the estate. If the decision of the Circuit Court of Appeals is correct it has been undeniably detrimental to the estate in that it has resulted in a loss of $162,240 from the corpus thereof.

**There is only one theory upon which the validity of this conveyance can be upheld,—that when the trustees conveyed a portion of the corpus of the estate to the City in trust for streets, the value of the property embraced in the streets immediately was reflected in the remaining property of the estate abutting upon the streets so conveyed,—which was correspondingly enhanced; that there was therefore no loss to the estate; and that the value of the property of the estate subsequent to the conveyance was the same as it had been prior to the conveyance and that the corpus of the trust estate was therefore not diminished.**

This is the theory of all the expert witnesses, both for the Langley Estate and the United States upon the trial. A finding of fact to that effect was made by the court below which the Circuit Court of Appeals refused to follow.

There is no escape therefore from the dilemma:

(1.) If the act of the trustees resulted in a transfer of the corpus of the estate to the detriment of the estate their act was in contravention of the trust and void.

(2.) If the act of the trustees enhanced the balance of the land remaining, it can be sustained under the dedication cases. But the act of the trustees cannot be held to be valid and at the same time result in a loss to the corpus of the estate of $162,240 as has been the decision of the court below.

## POINT IV.

**The City's assignment of errors presented no claim in the court below to any part of the judgment, and the action of that court in ordering the assignment was a plain error which may be remedied in this court.**

Upon the trial the City conceded that it claimed no relief and was entitled to none in this action (fol. 86). It claimed title to disputed streets as far as the high water mark and demanded that the complaint be dismissed (answer, fol. 53).

The main assignments of error to the Circuit Court of Appeals was that the complaint should have been dismissed (assignment of error, fols. 495-504). The City was not a party to the judgment of the trial court, and the judgment did not even award costs against the City (Judgment, fols. 57-58).

It is obvious that the City was not aggrieved by the judgment, but was aggrieved by the court's opinion in which the court held that the deed was invalid. The City was in reality attempting to review that opinion which established a precedent adverse to the City's contentions. The opinion forms no part of the judgment appealed from.

> *Corning* v. *Troy Iron & Nail Factory*, 15 How. 451, 465.

Nor may an opinion of the court be made the target of assignment of error for review.

> *Behn M. & Co.* v. *Campbell*, 205 U. S. 403.
> *Mason* v. *United States*, 219 Fed. 547.
> *Gibson* v. *Luther*, 196 Fed. 203.
> *Ogden City* v. *Weaver*, 108 Fed. 564, 567.
> *Columbus Safe Deposit Co.* v. *Burke*, 88 Fed. 630.

This is for the reason that the opinion of the court below may be wrong and yet the judgment in the case may be right.

*Stoffregen* v. *Moore,* 271 Fed. 680.

This is peculiarily applicable in the case at bar where the court's judgment was correct even if the opinion as to the validity of the deed was wrong. But the City, not being able to review the opinion, and not being affected by or in fact a party to the judgment, was not entitled to review the judgment.

*Payne* v. *Niles,* 20 How. 219.
*Farmers Loan & Trust Co.* v. *Waterman,* 106 U. S. 265.

The City's writ of error to the Circuit Court of Appeals should have been dismissed.

Now on its assignment of error to this court, the City asks that the judgment be reversed unless the plaintiff will further assign over $500,000 of the judgment to the City, thus raising a totally new question never presented either to the trial court or the Circuit Court of Appeals (assignments of error, fols. 565-567).

It is elementary that on a trial without a jury a writ of error may only review "rulings of the court in the progress of the trial of the case," which are excepted to at the time, and duly presented by a bill of exceptions (§700 R. S.). There is no such ruling and no exception and no assignment of error as no suggestion that the City was entitled to any award was made at the trial. Indeed the City stipulated otherwise. In view of these circumstances, how may the City be heard here to argue that it is entitled to any part of the judgment? This court has repeatedly held that as it is reviewing a judgment of the Circuit Court of Appeals, the only assign-

ments of error open here are the ones urged in that court.

*United States* v. *Rogers,* 255 U. S. p. 168.
*Pine River Logging Imp. Co.* v. *United States,* 186 U. S. 279.
*Union Pacific Railway Co.* v. *Chicago R. Co.,* 163 U. S. 564.
*Keyser* v. *Phitz,* 133 U. S. 138.

A consideration of the assignments of error below necessarily invites attention to the fact that the City is not entitled to the assignment, and the court below exceeded its discretion. This is a "plain error" which may be reviewed in this court under Rule 21, even though the judgment of the Circuit Court was in such form that it was impossible for the defendant-in-error to attempt to review it by writ of error, even if the assignment itself were not conditional in form.

## POINT V.

**The deed from the trustees of the Langley Estate to the City of New York if valid conveyed the property within 61st and 62nd and 63rd Streets only to "The New York Bay" and terminated at high water mark.**

**(1) The City cannot claim that the deed carried to the pierhead line of 1890 as that point is not before the court under the pleadings.**

Encouraged by the totally unexpected action of the Circuit Court of Appeals awarding it $162,240 of the judgment, the City assigns as error that this court should further order the assignment to the City of $589,731.82 additional, representing the compensation awarded for the portions of 61st, 62nd and

63rd Streets between high water mark and the pierhead line of 1884 (assignment of error, record, page 340). This claim is at absolute variance with the City's previous course of conduct throughout the trial. The court refused to permit an amendment of the answer to set up such a claim.

The City's course of conduct shows an absolute lack of good faith in urging this point in view of its concession on the record that the City is not entitled to any relief in this action (fol. 86). It had been stipulated between the plaintiff and the United States that the dispute of title only affected "the real property comprised in the beds of 61st, 62nd and 63rd Streets, Borough of Brooklyn, City of New York, extending from the westerly side of First Avenue to high water mark, the title to which said property is claimed by the United States of America to be in the City of New York." (Stip. Plaintiff's Ex. W. Record p, 309, fol. 510.)

Attached to the complaint is the report of the Judge Advocate General upon the title of the Langley property, in which he finds that only those portions of the street lying between First Avenue and highwater mark were held by the City of New York in fee. (Record, p. 26, fol. 48.)

The War Department Board of Appraisers had deducted from the award 81,120 square feet, being the areas of the streets between First Avenue and the high water line (fol. 49). The answer of the City of New York sets up a claim to the property in the streets between First Avenue and the New York Bay and asserts "that the area of said streets is 81,120 square feet." (Answer, p. 29, fol. 55.) It is thus apparent that the City's answer sets up a claim of title only as far as high water mark. There was no ambiguity, as suggested in the City's brief, about this claim.

Moreover, the Corporation Counsel agreed that the area "between the westerly side of First Avenue and the existing high water mark at the time of the taking" was 81,120 square feet. (Defendant's Ex. 1, Record p. 309.) This stipulation was entered into for the purpose of confining the dispute of title to that area and for the further purpose of adopting the square foot area formerly used by the Government.

Throughout the trial plaintiff's counsel asserted that the dispute only affected title to the property to high water mark (fol. 72) without any objection or contrary suggestion from the City. Testimony was produced as to the area of the streets between First Avenue and the high water mark at the time of the conveyance in 1899, it being the contention of the Langley Estate that additional uplands formed since that time had been made by filling in and not by accretion (fols. 74 and 76). No objection to this testimony was made by the City. It was not until after the court refused to find that the streets between First Avenue and high water mark comprised an entire block in extent, as required by Section 922 of the charter for the validity of a conveyance (See request of finding of the City of New York, Nos. 5, 6 and 7, Record, page 282, fols. 451-2) that the City first suggested that the deed extended to the pierhead line instead of to high water mark.

The City then moved to amend its answer by substituting a claim of title extending as far out as the pierhead line of 1890. (Motion to amend, Record, p. 269.) Naturally this motion to amend, asserting an entirely new and insistent claim totally at variance with the stipulation, answer and previous course of conduct of the City thus made after the case had been decided, was denied. (Record, p. 270, fol. 225).

The denial of the motion was discretionary and cannot be reviewed here.

This court has repeatedly held that the allowance or refusal of amendments to pleadings, and the granting or refusing of leave to file an additional plea, are matters for the discretion of the trial court and are not reviewable.

*Chirac* v. *Reinicker,* 11 Wheat, 280.
*Wright* v. *Hollingsworth,* 1 Pet. 165.
*Ex Parte Bradstreet,* 7 Pet. 634.
*Chapman* v. *Barney,* 129 U. S. 677, 681.
*Bullitt County* v. *Washer,* 130 U. S. 142, 145.
*Gormley* v. *Bunyan,* 138 U. S. 623, 630.

Nevertheless, the City proceeds to argue the case upon the assumption that the motion was granted instead of denied and as if the point is before this court for review, which of course, is not the case.

**(2) Under the law of New York the conveyance "to the New York Bay" terminated at high water mark and such construction is corroborated by the map attached to the deed.**

At the time of the taking the distance between high water line and the west side of First Avenue at 61st Street, was about 316 feet; at 62nd Street about the same; at 63rd Street about 650 feet due to filling in. The total area of these streets was 81,120 sq. ft. (Stipulation United States, City of New York, Plaintiff's Exhibit 1, p. 309). This involved a claim by the City to less than 5% of the property.

The City's claim to the pierhead line would move the boundaries of the deed to a distance from 1835 to 1882 feet from the west side of First Avenue. In other words the City now attempts to extend the western boundary of the deed an average of about 1500 feet or 1/3 of a mile further into the Bay. At the pierhead line the depth of water was from 35 feet to 40 feet. So the effect of the City's belated motion to amend its answer was to claim as the beds of streets land under water

from one foot to 40 feet in depth, even to a point over 650 feet beyond a bulkhead line beyond which no solid fill could be legally made. The City's claim would extend its streets system to lands which must always remain covered with water.

The area in the streets to high water mark, 81,120 sq. ft. at the time of taking was much greater than at the time of the delivery of the deed, when it was 58,770 sq. ft. (Trust fol. 75). The additional area had even caused by filling and taking 81,120 sq. ft. as the area the City received the most favorable construction of the deed.

Such a vast enlargement of the area in the deed to carry over 1/3 of a mile of lands under water is not justified.

The description in the deed conveys lands "lying within the boundaries of 61st Street as laid down on the Commissioners' Map for the laying out of streets and avenues in the towns of the County of Kings between Second Avenue and the New York Bay" (Exhibit D). Practically the same description applies to 62nd and 63rd Streets and the deed further states "the lands hereinbefore described are shown on the annexed map." The termination of "the New York Bay" naturally meant where the land ended and the bay began. This was at the line of high water. This construction is in harmony with the elementary law of New York State that a deed containing a description of lands adjoining navigable tide waters and extending "to the beach", "to the sea," "to the bay", "to the seashore," carries only to high water mark.

*Gerard on Titles to Real Estate*, 4th Ed., p. 509,

9 *Corpus Juris*, 182, New York Cases, note 57.

*Trustees of East Hampton* v. *Kirk*, 68 N. Y., 459,

*McRoberts* v. *Bergman*, 132 N. Y. 73,

*Rockaway Park Improvement Co.* v. *City of New York*, 140 App. Div. 160,
*John Clarke Estate* v. *City of New York*, 165 App. Div., 873,
*Tiffany* v. *Town of Oyster Bay*, 209 N. Y., 1, 9.

The City states that land under water is presumed to be included in a deed, where the owner parts with upland, unless there is an unmistakable intention to include it. Not only the description, but the town commissioners map to which reference is made and the map attached to the deed show an unmistakable intent not to include therein any lands under water. That doctrine has only been applied where the owner parts with all his upland and would have, therefor, no further use for the lands under water. In this case the owner parted with upland merely to provide access to the waterfront, the real value of which was in the lands under water at which piers could be constructed. Still the intent to exclude any property below high water was clear. The town commissioners map to which reference is made as showing the boundaries of the streets shows the dimensions and locations of the streets existing and laid out as far as the bulkhead line only. No streets are shown such as laid out to the pierhead line over 600 feet further out in the Bay. This map shows a line marked "High water line", about 350 feet from First Avenue, in the middle of a block labeled as 700 feet long. Then there is a lateral street labeled "Narrows Avenue" 80 feet wide out in the water and another block 473 feet long out in the water to the bulkhead line. The description in the deed adopts the western and southern boundaries of the streets but limits the eastern and western boundaries "between Second

Avenue and the New York Bay," viz. at high water mark. That construction has been placed upon the deed by the legal authorities of the United States, (see opinion Judge Advocate, General Exhibit C, fol. 46, Stipulation, Exhibit W, fol. 510, between plaintiff and United States); and also by the City (Stipulation, Exhibit 1, fol. 511, and answer of City, fol. 54) until the City, in order to sustain the validity of the deed, asked the trial court to find that the property between First Avenue and "the New York Bay" comprised an entire block in extent (Requests to Find, Nos. V, VI, and VII, fol. 451) and such requests were refused.

The map attached to the deed itself shows the streets extending from First Avenue to a WAVEY line, and there terminating. Photostat copies of this map will be handed up upon the argument. On the west side of this line are the words "New York Bay", showing clearly that water existed on the western side of the line. If it had been the intention to carry further, Narrows Avenue, and the bulkhead line and pierhead must have appeared on this map. Narrows Avenue does not appear showing clearly that the deed stopped before reaching the Avenue. Nor does the bulkhead line appear on the pierhead line nearly 1/3 of a mile further out into the Bay.

The map is made a part of the deed by reference. If the monuments in the deed were repugnant to those of the map (which is not the case, for one corroborates the other) they must be construed together.

*Borkman* v. *Kurzman*, 94 N. Y. 272, 276.

## CONCLUSION.

**The judgment should be affirmed with interest thereon as provided by Rule 23 of this court, and the conditional assignment of $162,240 of the judgment to the City of New York should be declared null and void.**

January, 1923.

Respectfully submitted,

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# UNITED STATES AND CITY OF NEW YORK *v.* BENEDICT, SOLE SURVIVING TRUSTEE OF LANGLEY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 394. Argued January 23, 1923.—Decided March 5, 1923.

1. In an action to recover money from the United States, wherein, upon a suggestion made by the Circuit Court of Appeals to avoid a reversal, the plaintiff assigned part of the recovery to a city which claimed an interest in the premises but insisted that the complaint should have been dismissed. *Held*, that the city, by not objecting to the suggestion in the Court of Appeals and by waiting three months before suing out a writ of error here, must be deemed to have accepted the assignment and consented to the judgment and that its writ of error must be dismissed. P. 298.
2. In an action against the United States for a balance due on property taken under the Lever Act, interest is recoverable from the date of the taking. P. 298. *Seaboard Air Line Ry. Co.* v. *United States, post*, 299.

Writ of error of City of New York to review 280 Fed. 76, dismissed. As to the United States, judgment affirmed.

ERROR to a judgment of the Circuit Court of Appeals affirming, with modification, a judgment of the District Court for the plaintiff, in an action against the United States for a balance due as compensation for property taken under the Lever Act. The City of New York was joined as co-defendant to adjudicate its claim of interest in the property.

*Mr. Alfred A. Wheat*, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

*Mr. Charles J. Nehrbas*, with whom *Mr. Edward J. Kenney, Jr.*, was on the brief, for the City of New York, plaintiff in error.

The City of New York succeeded in the Circuit Court of Appeals to the extent of recovering the value of the beds of the streets between First Avenue and the high water line, but was unsuccessful in that it failed to recover the value of the portions of the streets between the high water line and the pier line.

The City has accordingly sued out its writ of error to bring before this Court the question of its right to compensation for the portions of the beds of the streets in question between the high water line and the pier line approved by the Secretary of War on March 4, 1890.

The deed conveyed to the City the land within the lines of the streets to the pier head line.

The deed was within the power of the trustees who executed it, and was in all respects valid and effectual to convey the premises to the City.

The judgment should be modified by requiring defendant in error to assign to the City of New York an additional portion of the judgment recovered against the United States, representing the compensation, with interest, awarded for the portions of the streets between the high water line and the pier head line, to wit, the sum of $589,731.82.

*Mr. Royal E. T. Riggs*, with whom *Mr. William H. Seibert* was on the brief, for defendant in error.

The only question between plaintiff and the United States is the right to interest and the assignments of error do not present that question for review.

Just compensation must include interest upon the value of the property at the time of the taking from the date of the actual appropriation thereof to the date of payment therefor.

The Circuit Court of Appeals erred in requiring the plaintiff to execute and file an assignment of $162,240 of the judgment to the City of New York because: (a) The

City had stipulated on the trial that it was entitled to no relief in this action. (b) The plaintiff was entitled to the judgment even if the title to the streets was in the City. (c) Title to the disputed streets was in the plaintiff.

The City's assignments of error presented no claim in the court below to any part of judgment, and the action of that court in ordering the assignment was a plain error which may be remedied in this Court.

The deed from the trustees if valid conveyed the property with 61st, 62nd and 63rd Streets from Second Avenue only to "the New York Bay" and terminated at high water mark. The City cannot claim that the deed carried to the pier head line of 1890, as that point is not before the Court under the pleadings. Under the law of New York the conveyance to "the New York Bay" terminated at high water mark and such construction is corroborated by the map attached to the deed.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Relying upon the Lever Act—40 Stat. 276, 279—the United States took possession of certain land along New York Bay, April 6, 1918, and, as surviving trustee under the will of Langley, defendant in error Benedict instituted this proceeding to recover its value. The tract had been platted into blocks and trustees holding the title had undertaken to convey to New York City the beds of 61st, 62nd and 63rd streets from designated avenues "to the New York Bay," as laid down on the Commissioners' map. The City was made defendant to the amended complaint because of possible interest arising out of this conveyance. No right of recovery against it was suggested. It answered rather vaguely, but claimed title to "the lands included within the limits of 61st Street, 62nd Street and 63rd Street from the westerly side of First Avenue to the New York Bay," and stated that "the

area of said streets is 81,120 square feet." It asked that the complaint be dismissed. Later it moved, without success, to amend the answer and set up ownership to the beds of 61st, 62nd and 63rd streets to the pierhead line.

The cause was tried by the court without a jury. The United States stipulated that defendant in error had good title to all the tract, upland and submerged, except such as lay within 61st, 62nd and 63rd streets to high water mark. Among the findings of fact which the City proposed is this—

"That on April 25, 1899, the said trustees duly executed and delivered to John Whalen, the then corporation counsel of the city of New York, a deed granting and conveying to the city of New York the fee, impressed with a trust for street purposes, of the lands included within the limits of 61st Street, 62nd Street and 63rd Street from the westerly side of First Avenue to the New York Bay."

Judgment went against the United States for a sum equal to two dollars per square foot of the whole area, with interest, less cash originally paid. The trial court held the trustees' deed to the streets invalid, but if valid that the recovery nevertheless should be for the same amount as streets were essential to enjoyment of the property. 271 Fed. 714.

Writs of error from the Circuit Court of Appeals were sued out by both defendants. The City assigned as error—among others—the trial court's refusal to dismiss the complaint. By opinion dated January 18, 1922—280 Fed. 76—the court ruled that the City had good title to the streets, that the judgment of the District Court was erroneous and a new trial would be awarded unless out of the recovery defendant in error should assign to it $162,240—two dollars per square foot for the platted streets up to New York Bay, 81,120 square feet as stated

by the answer. January 28th the trustees so assigned $162,240, with interest from April 6, 1918, and on January 31st the contested judgment was formally affirmed.

In the Circuit Court of Appeals the City entered no objection to the arrangement suggested by the opinion. Its counsel here claim that "the judgment should be modified by requiring defendant in error to assign to the City of New York an additional portion of the judgment recovered against the United States, representing the compensation, with interest, awarded for the portions of the streets between the high water line and the pierhead line, to wit, the sum of $589,731.82."

The situation is a peculiar one. The City asked, not for recovery, but to be dismissed. Of its own motion and off the record, the court proposed a method of settlement which the trustee adopted in preference to reversal. These unusual circumstances required the City to act promptly if it did not approve. After nearly three months it took a writ of error and now seeks to reverse the judgment because a greater sum was not awarded. We think it may not deny voluntary acceptance of the assignment and full assent to the arrangement which defendant in error carried out with the obvious purpose of ending the controversy between them. It cannot hold what it accepted and demand more. The final judgment must be treated as though entered upon its express consent; and its writ of error is accordingly dismissed.

The United States object to the judgment because interest was allowed from date of the taking. This point has been discussed and determined in *Seaboard Air Line Ry. Co.* v. *United States*, decided today, *post*, 299, and needs no further elaboration. As to the United States, the judgment below is

*Affirmed.*